PROCEEDINGS

OF THE

American Society of International Law

AT ITS

SECOND ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 24 AND 25, 1908

BAKER, VOORHIS & CO., PUBLISHERS
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CONSTITUTION

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

ARTICLE I.

Name.

This Society shall be known as the AMERICAN SOCIETY OF INTERNATIONAL LAW.

ARTICLE II.

Object.

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will cooperate with other societies in this and other countries having the same object.

ARTICLE III.

Membership.

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the publications issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled

to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership but shall be exempt from the payment of dues.

ARTICLE IV.

Officers.

The officers of the Society shall consist of a President, nine or more Vice-Presidents, the number to be fixed from time to time by the Executive Council, a Recording Secretary, a Corresponding Secretary and a Treasurer, who shall be elected annually, and of an Executive Council composed of the President, the Vice-Presidents, *ex-officio,* and twenty-four elected members, whose term of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that anyone elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen.

The Recording Secretary, the Corresponding Secretary, and the Treasurer shall be elected by the Executive Council from among its members. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all the offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee of five members of the Society previously appointed by the Executive Council, except that the officers of the first year shall be nominated by a committee of three appointed by the Chairman of the meeting at which this Constitution shall be adopted.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

ARTICLE V.

Duties of Officers.

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council.

2. The Secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to them.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programmes therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

ARTICLE VI.

Meetings.

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

ARTICLE VII.

Resolutions.

All resolutions which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

ARTICLE VIII.

Amendments.

This Constitution may be amended at any annual or special meeting of the Society by a majority vote of the members present and voting. But all amendments to be proposed at any meeting shall first be referred to the Executive Council for consideration and shall be submitted to the members of the Society at least ten days before such meeting.

Adopted January 12, 1906.[1]

[1] NOTE. — The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting, at page 23.

OFFICERS

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

FOR THE YEAR 1908–09

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SECOND ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

PROGRAM

FRIDAY, APRIL 24, MORNING SESSION

At 10 o'clock

PRESIDENT'S ADDRESS

Topic: Should the Violation of Treaties be Made a Federal Offense?

AFTERNOON SESSION

At 2.30 o'clock

The President will receive the members of the Society in the East Room of the White House.

At 3.30 o'clock

Topic: How Far Should Loans Raised in Neutral Nations for the Use of Belligerents be Considered a Violation of Neutrality?
Reading of papers and general discussion.

EVENING SESSION

At 8 o'clock

Topic: Arbitration at the Second Hague Conference.

SATURDAY, APRIL 25, MORNING SESSION

At 10 o'clock

Topic: The Codification of International Law: Its Desirability and Its Progress.

AFTERNOON SESSION

At 2.30 o'clock

Topic: The Organization, Jurisdiction, and Procedure of an International Court of Prize.

GENERAL BUSINESS AND ELECTION OF OFFICERS

EVENING SESSION

At 7 o'clock

ANNUAL BANQUET OF THE SOCIETY AT THE NEW WILLARD.

SECOND ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

HELD AT THE

NEW WILLARD HOTEL, WASHINGTON, D. C.

ON

FRIDAY AND SATURDAY, APRIL 24 AND 25, 1908

MORNING SESSION

Friday, April 24, 1908

The meeting was called to order at 10 o'clock a. m. by the President of the Society, Hon. Elihu Root.

Mr. ROOT. Gentlemen of the Society, and Ladies: It is a pleasure to welcome you to the American capital for the Second Annual Meeting of the American Society of International Law. The year that has passed since the first meeting furnishes abundant proof that it is no academic subject which we are studying, and that it is no dead language in which we speak.

During that short year the Second International Conference has made what may fairly be declared the greatest single advance ever made at one time in the development and acceptance of rules of international law for the government of national conduct. I will not attempt to enumerate the other evidences of increasing interest and active participation by the people of the world in the development of the science of international law, but its evidences are many. In our own country eleven of the conventions signed at The Hague have been approved by the Senate. In our country also the work of establishing a general system under which there may be impartial judgment upon the application of the rules of international law to

international conduct has been advanced by the signing and ratification by the Senate of treaties of arbitration between the United States, England, France, Spain, Portugal, Norway, Switzerland, Italy, and Mexico. In our own country also during the past year has assembled a conference in congress of the representatives of all five of the Central American states, who have agreed, after long and temperate and kindly discussion, upon a series of conventions, all of which have been ratified by their respective countries in the design to promote the reasonable solution of difficulties in that long much-distracted part of the earth, having at the fore the establishment of a judicial tribunal for the settlement of all questions that arise between the five Central American nations, a tribunal in which shall sit a court of five prominent judges, having no other business than the judicial work of the tribunal.

Our Society has given evidence of the widespread interest felt in the United States in the subject of international law. Beginning with a very few members, during the short period of its existence it has, without much advertising, naturally expanded until there are now on the rolls over nine hundred members.

In accordance with the custom which Dr. Scott has imposed upon the Society, the President is expected to make some remarks at the opening of each annual meeting of the Society upon some subject connected with international law, and without availing myself of the opportunity which I have to occupy the entire time of the annual meeting, I shall discharge that duty by making a few very brief observations on the subject of "The sanction of international law."

ADDRESS OF THE PRESIDENT OF THE SOCIETY, MR. ELIHU ROOT, OF WASHINGTON, D. C.

One accustomed to the administration of municipal law who turns his attention for the first time to the discussion of practical questions arising between nations and dependent upon the rules of international law, must be struck by a difference between the two systems which materially affects the intellectual processes involved in every discussion, and which is apparently fundamental.

The proofs and arguments adduced by the municipal lawyer are addressed to the object of setting in motion certain legal machinery which will result in a judicial judgment to be enforced by the entire power of the state over litigants subject to its jurisdiction and control. Before him lies a clear, certain, definite conclusion of the controversy, and for the finality and effectiveness of that conclusion the sheriff and the policeman stand always as guarantors in the last resort.

When the international lawyer, on the other hand, passes from that academic discussion in which he has no one to convince but himself, and proceeds to seek the establishment of rights or the redress of wrongs in a concrete case, he has apparently no objective point to which he can address his proofs or arguments, except the conscience and sense of justice of the opposing party to the controversy. In only rare, exceptional and peculiar cases, do the conclusions of the international lawyer, however, clearly demonstrated, have behind them the compulsory effect of possible war. In the vast majority of practical questions arising under the rules of international law there does not appear on the surface to be any reason why either party should abandon its own contention or yield against its own interest to the arguments of the other side. The action of each party in yielding or refusing to yield to the arguments of the other appears to be entirely dependent upon its own will and pleasure. This apparent absence of sanction for the enforcement of the rules of international law has led great authority to deny that those rules are entitled to be called law at all; and this apparent hopelessness of finality carries to the mind which limits its consideration to the procedure in each particular case, a certain sense of futility of argument.

Nevertheless, all the foreign offices of the civilized world are continually discussing with each other questions of international law, both public and private, cheerfully and hopefully marshaling facts furnishing evidence presenting arguments and building up records, designed to show that the rules of international law require such and such things to be done or such and such things to be left undone. And in countless cases nations are yielding to such arguments and shaping their conduct against their own apparent interests in the

particular cases under discussion, in obedience to the rules which are shown to be applicable.

Why is it that nations are thus continually yielding to arguments with no apparent compulsion behind them, and before the force of such arguments abandoning purposes, modifying conduct, and giving redress for injuries? A careful consideration of this question seems to lead to the conclusion that the difference between municipal and international law, in respect of the existence of forces compelling obedience, is more apparent than real, and that there are sanctions for the enforcement of international law no less real and substantial than those which secure obedience to municipal law.

It is a mistake to assume that the sanction which secures obedience to the laws of the state consists exclusively or chiefly of the pains and penalties imposed by the law itself for its violation. It is only in exceptional cases that men refrain from crime through fear of fine or imprisonment. In the vast majority of cases men refrain from criminal conduct because they are unwilling to incur in the community in which they live the public condemnation and obloquy which would follow a repudiation of the standard of conduct prescribed by that community for its members. As a rule, when the law is broken the disgrace which follows conviction and punishment is more terrible than the actual physical effect of imprisonment or deprivation of property. Where it happens that the law and public opinion point different ways, the latter is invariably the stronger. I have seen a lad grown up among New York toughs break down and weep because sent to a reformatory instead of being sentenced to a State's prison for a violation of law. The reformatory meant comparative ease, comfort, and opportunity for speedy return to entire freedom; the State's prison would have meant hard labor and long and severe confinement. Yet in his community of habitual criminals a term in State's prison was a proof of manhood and a title to distinction, while consignment to a reformatory was the treatment suited to immature boyhood. He preferred the punishment of manhood with what he deemed honor to the opportunity of youth with what he deemed disgrace. Not only is the effectiveness of the punishments denounced by law against crime derived chiefly from the

public opinion which accompanies them, but those punishments themselves are but one form of the expression of public opinion. Laws are capable of enforcement only so far as they are in agreement with the opinions of the community in which they are to be enforced. As opinion changes old laws become obsolete and new standards force their way into the statute books. Laws passed, as they sometimes are, in advance of public opinion ordinarily wait for their enforcement until the progress of opinion has reached recognition of their value. The force of law is in the public opinion which prescribes it.

The impulse of conformity to the standard of the community and the dread of its condemnation are reinforced by the practical considerations which determine success or failure in life. Conformity to the standard of business integrity which obtains in the community is necessary to business success. It is this consideration far more frequently than the thought of the sheriff with a writ of execution that leads men to pay their debts and to keep their contracts. Social esteem and standing, power and high place in the professions, in public office, in all associated enterprise, depend upon conformity to the standards of conduct in the community. Loss of these is the most terrible penalty society can inflict. It is only for the occasional nonconformist that the sheriff and policeman are kept in reserve; and it is only because the nonconformists are occasional and comparatively few in number that the sheriff and the policeman can have any effect at all. For the great mass of mankind laws established by civil society are enforced directly by the power of public opinion, having, as the sanction for its judgments, the denial of nearly everything for which men strive in life.

The rules of international law are enforced by the same kind of sanction, less certain and peremptory, but continually increasing in effectiveness of control. "A decent respect to the opinions of mankind" did not begin or end among nations with the American Declaration of Independence; but it is interesting that the first public national act in the New World should be an appeal to that universal international public opinion, the power and effectiveness of which the New World has done so much to promote.

In former times, each isolated nation, satisfied with its own opin-

ion of itself and indifferent to the opinion of others, separated from all others by mutual ignorance and misjudgment, regarded only the physical power of other nations. Gibbon could say of the Byzantine Empire: "Alone in the universe, the self-satisfied pride of the Greeks was not disturbed by the comparison of foreign merit; and it is no wonder if they fainted in the race, since they had neither competitors to urge their speed nor judges to crown their victory." Now, however, there may be seen plainly the effects of a long-continued process which is breaking down the isolation of nations, permeating every country with better knowledge and understanding of every other country, spreading throughout the world a knowledge of each government's conduct to serve as a basis for criticism and judgment, and gradually creating a community of nations, in which standards of conduct are being established, and a world-wide public opinion is holding nations to conformity or condemning them for disregard of the established standards. The improved facilities for travel and transportation, the enormous increase of production and commerce, the revival of colonization and the growth of colonies on a gigantic scale, the severance of the laborer from the soil, accomplished by cheap steamship and railway transportation and the emigration agent, the flow and return of millions of emigrants across national lines, the amazing development of telegraphy and of the press, conveying and spreading instant information of every interesting event that happens in regions however remote — all have played their part in this change.

Pari passu with the breaking down of isolation, that makes a common public opinion possible, the building up of standards of conduct is being accomplished by the formulation and establishment of rules that are being gradually taken out of the domain of discussion into that of general acceptance — a process in which the recent conferences at The Hague have played a great and honorable part. There is no civilized country now which is not sensitive to this general opinion, none that is willing to subject itself to the discredit of standing brutally on its power to deny to other countries the benefit of recognized rules of right conduct. The deference shown to this international public opinion is in due proportion to a nation's great-

ness and advance in civilization. The nearest approach to defiance will be found among the most isolated and least civilized of countries, whose ignorance of the world prevents the effect of the world's opinion; and in every such country internal disorder, oppression, poverty, and wretchedness mark the penalties which warn mankind that the laws established by civilization for the guidance of national conduct can not be ignored with impunity.

National regard for international opinion is not caused by *amour propre* alone — not merely by desire for the approval and good opinion of mankind. Underlying the desire for approval and the aversion to general condemnation with nations as with the individual, there is a deep sense of interest, based partly upon the knowledge that mankind backs its opinions by its conduct and that nonconformity to the standard of nations means condemnation and isolation, and partly upon the knowledge that in the give and take of international affairs it is better for every nation to secure the protection of the law by complying with it than to forfeit the law's benefits by ignoring it.

Beyond all this there is a consciousness that in the most important affairs of nations, in their political status, the success of their undertakings and their processes of development, there is an indefinite and almost mysterious influence exercised by the general opinion of the world regarding the nation's character and conduct. The greatest and strongest governments recognize this influence and act with reference to it. They dread the moral isolation created by general adverse opinion and the unfriendly feeling that accompanies it, and they desire general approval and the kindly feeling that goes with it.

This is quite independent of any calculation upon a physical enforcement of the opinion of others. It is difficult to say just why such opinion is of importance, because it is always difficult to analyze the action of moral forces; but it remains true and is universally recognized that the nation which has with it the moral force of the world's approval is strong, and the nation which rests under the world's condemnation is weak, however great its material power.

These are the considerations which determine the course of national conduct regarding the vast majority of questions to which are to be applied the rules of international law. The real sanction which

enforces those rules is the injury which inevitably follows nonconformity to public opinion; while, for the occasional and violent or persistent lawbreaker, there always stands behind discussion the ultimate possibility of war, as the sheriff and the policeman await the occasional and comparatively rare violators of municipal law.

Of course, the force of public opinion can be brought to bear only upon comparatively simple questions and clearly ascertained and understood rights. Upon complicated or doubtful questions, as to which judgment is difficult, each party to the controversy can maintain its position of refusing to yield to the other's arguments without incurring public condemnation. Upon this class of questions the growth of arbitration furnishes a new and additional opportunity for opinion to act; because, however complicated the question in dispute may be, the proposition that it should be submitted to an impartial tribunal is exceedingly simple, and the proposition that the award of such a tribunal shall be complied with is equally simple, and the nation which refuses to submit a question properly the subject of arbitration naturally invites condemnation.

Manifestly, this power of international public opinion is exercised not so much by governments as by the people of each country whose opinions are interpreted in the press and determine the country's attitude towards the nation whose conduct is under consideration. International opinion is the consensus of individual opinion in the nations. The most certain way to promote obedience to the law of nations and to substitute the power of opinion for the power of armies and navies is, on the one hand, to foster that " decent respect to the opinions of mankind " which found place in the great Declaration of 1776, and, on the other hand, to spread among the people of every country a just appreciation of international rights and duties and a knowledge of the principles and rules of international law to which national conduct ought to conform; so that the general opinion, whose approval or condemnation supplies the sanction for the law, may be sound and just and worthy of respect.

Mr. Root. The first thing to be done by the Society is a matter of business before the general discussion. A motion for the appoint-

ment of a committee to nominate officers for the ensuing year will be in order.

Mr. GEORGE W. KIRCHWEY. Mr. President, I move that such a committee be appointed, consisting of five members, as provided in the Constitution.

The motion was agreed to, and the President appointed as such committee Mr. G. W. Scott, Mr. S. J. Barrows, Mr. Kirchwey, Mr. Wilson, and Mr. Lansing.

Mr. CHARLES N. GREGORY. Mr. President, I move that the Committee on Nominations be requested to report at the end of this morning's session.

Mr. ROOT. The committee will regard itself as instructed to report at the end of the morning session. Before proceeding to the discussion, I will advise members of the Society that the President of the United States will receive members at the White House at half-past two o'clock precisely, and that for the purpose of identification members should provide themselves with cards, which can be obtained in the little red room at the side of the F street entrance of the hotel, just at the top of the stairs.

If there is no other business, we will proceed with the discussion upon the topic "Should the violation of treaties be made a Federal offense?" The Chair will recognize Hon. George Turner.

ADDRESS OF MR. GEORGE TURNER, OF SPOKANE, WASHINGTON.

Mr. President, and Ladies and Gentlemen: The right and power of the Federal Government to make violations of its treaties by its own citizens penal offenses has never been made the subject of determination by the courts, so far as I am informed. I do not know that the power has ever been questioned, but the fact that it has never been exercised, and that there is a dearth of judicial authority on the subject, makes it proper to state with some fullness the grounds upon which it is believed the power can be sustained.

The Government of the United States is a Federal Government, and, for domestic purposes, the subjects of sovereignty are divided

between it and the States of which it is composed; but for all international purposes, as well as for the domestic purposes coming within the purview of its powers, it is a nation in the largest sense of the term — possessing all the powers of any other nation. This statement must be qualified by the admission that its powers are limited by its written Constitution, and that that instrument curtails to some extent the scope of its treaty-making power and the method of the enforcement of treaties on its own citizens, but those limitations are known to the publicists of other nations, and therefore enter into every international agreement we make and constitute limitations on their scope of which other nations have no right to complain. The same thing may be said of every constitutional government, and it is not in any true sense an impeachment of their power as nations. All barbarous and semi-civilized governments are absolute in the power to submit the lives and property of their subjects, the integrity of their political subdivisions, and the exercise by them of local municipal administration, to the exigencies of treaty stipulation; but this power is an evidence of weakness rather than of strength in their international standing, and subjects them to exactions from which other and more advanced nations are exempt. It is, perhaps, more accurate to say that the Government of the United States, within the constitutional limits which bind it, for all the purposes of the law of nations, so far as that law defines the rights and obligations of nations, and for all the purposes of entering into treaty engagements and of performing them and of requiring their performance by others, is a nation in the largest sense of the term, possessing all the powers of any other nation. For these purposes it admits no divided sovereignty with any other state, foreign or domestic, and its powers, for the purposes stated, are equally broad and unlimited, whether exerted externally and beyond its borders, or internally and within the limits of its own territory. The performance by such a nation of its international duties, which includes the duty of compelling its own citizens to respect and observe the engagements it has made in favor of foreign nations, is one of its most important functions, essential alike to its self-respect, its sense of justice, and its standing among other nations. To deny it the power

to perform that duty by any means appropriate to the end would be to paralyze and ultimately to destroy it. Duty and want of power to comply with its requirements are, in a governmental sense, incompatible and utterly repugnant ideas.

It requires to take but one step further in the demonstration, and that is to inquire whether the lending by a government of penal sanction to its international engagements, so far as those engagements operate on and require for their observance the obedience of its citizens, is an appropriate means to the end sought — that is to say, would it secure or tend to secure for such engagements their due observance? It is sufficient to say in disposing of that inquiry that a negative answer would require the abrogation of all penal laws.

Since, then, the power to enforce respect for its treaties resides in every nation and must reside in ours, and the enactment of penal laws is an appropriate means to that end, it necessarily follows from the nature of the power and the nature of our Government that the power resides in the National Government to make violations of its treaties Federal offenses. An examination of the Constitution for the purpose of finding if there be any limitation on the power discloses that there is none. On the contrary, there appears to be express warrant in the Constitution for the exercise of the power. Article VI of that instrument declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Section VIII, Article I, declares that "The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Section II, Article III, declares that "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority," etc. The jurisdiction declared

by the last section referred to does not attach *ipso facto,* but it is the measure or limit within which Congress must confine itself in the creation of rights and duties enforceable by Federal judicial procedure. It may be taken, also, as a declaration of the power of Congress to legislate within the limits declared. The section creates a vast reservoir of Federal judicial power, beyond the limits of which Congress can not go, but within which limits it may carve out and assign to any Federal tribunal the fullest measure of supreme and unlimited jurisdiction. If, then, a criminal prosecution for the breach of a treaty, to which breach Congress had attached a penalty, would be a case arising under that treaty, express constitutional authority in Congress to attach such penalty and make the case cognizable in one of the Federal courts would seem to be made out. I maintain that such a prosecution would be a case arising under the treaty. The treaty without any penalty attached to it is a part of the law of the land, binding on all persons. The attaching a penalty to its breach does not make the treaty any more the law. The courts in adjudicating its breach would look at the treaty, construe its meaning and define the same, and would look at the law only for the purpose of finding the penalty. It is the treaty which measures the duty of the citizen, and it is the violation of the treaty which brings the penalty into play. As well say that civil causes, in which treaty rights are brought into question, arise under the statute giving the courts power to adjudicate such rights instead of under the treaty, as to say that a prosecution for a criminal breach of a treaty arose under the statute giving the court jurisdiction of the crime instead of under the treaty which had been broken. We are not without express authority on this point. In a habeas corpus case, where the prisoner was held under extradition proceedings, appealed to the Supreme Court of the United States, the contention was made that the case only involved a construction of the acts of Congress on the subject of extradition, and hence that there was no jurisdiction in the court on appeal. The Supreme Court, in disposing of that contention, say:

We do not concur in this view. The treaties of 1842 and 1889 are the basis of this litigation, and no effective decision can be made of

the controlling questions arising upon the appeal without an examination of those treaties and a determination of the meaning and scope of some of their provisions. A case may be brought directly from a circuit court to this court if the construction of a treaty is therein drawn in question. (26 Stat. 826, ch. 517, sec. 5.) The petition for the writ of habeas corpus and the warrant under which the accused was arrested both refer to the treaty of 1842, and the court below, properly we think, proceeded on the ground that the determination of the questions involved in the case depended in part, at least, on the meaning of certain provisions of the treaty. The construction of the treaties was none the less drawn in question because it became necessary or appropriate for the court below also to construe the Act of Congress passed to carry their provisions into effect. — *Pettit v. Walsh, 194 U. S., 205.*

A somewhat analogous case arose in the history of the Government under the Articles of Confederation. The capital was then at Philadelphia, and causes of national cognizance were heard and determined by the Supreme Court of Pennsylvania. A French citizen, aggrieved at the refusal of the secretary of the French legation to certify his former status as an officer in the French army, invaded the residence of the French minister, used threatening and opprobrious language toward the secretary, and subsequently, meeting him on the street, assaulted him. The Supreme Court of Pennsylvania held that the offense was one against the law of nations, which it held was a part of the laws of Pennsylvania, and inflicted as a penalty punishment conformable to that provided by the local municipal law for similar offenses. (Respublica v. De Longchamps, 1 Dallas, 111.)

The fact that Congress has never seen fit to assert its power to attach penalties to the violation of treaties leaves us without express judicial determination on the subject, but there are a multitude of decisions by the highest courts in the land, including the Supreme Court of the United States, which, by the clearest analogy, would sustain the exercise of the power. Among those cases are *Ex parte* Siebold, 100 U. S., 389; *Ex parte* Nagle, 135 U. S., 60; Logan v. United States, 144 U. S., 263; *In re* Debs, 158 U. S., 579. I do not quote from these cases and apply them, because of the necessary limits of this paper, but will say that it is impossible to read them without reaching the conclusion that they are fully and fairly deter-

minative of the question under discussion. The great men of the nation, however, who have filled the Executive chair, and their constitutional advisers, have had the specific question brought to their attention, and they have on more than one occasion spoken in no uncertain tones. President Harrison, in his annual message to Congress of December 9, 1891, after discussing the lynching of a number of Italians at New Orleans, which had given rise to diplomatic complications with Italy, spoke as follows:

> Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal courts. This has not, however, been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers.

President McKinley, in his annual message to Congress of December 5, 1899, moved by the lynching by a mob of five more Italians in Louisiana (this time at Tallulah), repeated the suggestion of President Harrison concerning congressional legislation and urged action upon it. He said:

> The recurrence of these distressing manifestations of blind mob fury directed at dependents or natives of a foreign country suggests that the contingency has arisen for action by Congress in the direction of conferring upon the Federal courts jurisdiction in this class of international cases, where the ultimate responsibility of the Federal Government may be involved. The suggestion is not new. In his annual message of December 9, 1891, my predecessor, President Harrison, said: "It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal courts."

After quoting from a bill covering the subject, introduced in the Senate in 1892, but not acted on, President McKinley continues:

> I earnestly recommend that the subject be taken up anew and acted upon during the present session. The necessity for some such provisions abundantly appears. Precedent for constituting a Federal jurisdiction in criminal cases where aliens are sufferers is rationally deducible from the existing statute which gives to the district

and circuit courts of the United States jurisdiction of civil suits brought by aliens where the amount involved exceeds a certain sum. If such jealous solicitude be shown for alien rights in cases of merely civil and pecuniary import, how much greater should be the public duty to take cognizance of matters affecting the life and the rights of aliens under the settled principles of international law no less than under treaty stipulations in cases of such transcendent wrong-doing as mob murder, especially when experience has shown that local justice is too often helpless to punish the offenders.

In his next annual message (that of December 3, 1900) President McKinley renewed his previous recommendation and reinforced it with additional observations, saying:

It is incumbent on us to remedy the statutory omission which has led, and may again lead, to such untoward results. I have pointed out the necessity and the precedent for legislation of this character. Its enactment is a simple measure of previsory justice toward the nations with which we as a sovereign equal make treaties requiring reciprocal observance.

Machinery for the protection of the civil rights of aliens, including their restoration to liberty when unlawfully detained in prison, much more elaborate than that indicated in the message of President McKinley, has been provided by the legislation of Congress. The appellate jurisdiction of the Supreme Court in cases brought from the highest courts of the States has always, since the judiciary act of 1789, extended to cases where a treaty having been drawn in question, the decision has been against the validity of the treaty or of a right of title claimed under it. The jurisdiction of the circuit and district courts has always since the same period extended to cases in which aliens were parties, and since the acts of March 3, 1887, and August 13, 1888, the circuit courts have had jurisdiction of all civil suits at law or in equity where the matter in dispute exceeds in value the sum of two thousand dollars, arising under the Constitution or laws of the United States or of treaties made or which shall be made under their authority, * * * or of controversies where a like amount is in dispute, between citizens of a State and foreign states, citizens, or subjects. By section 753 of the Revised Statutes of the United States all the courts of the United States may issue writs of

habeas corpus to release prisoners in custody under color of State laws in violation of the Constitution or of a law or treaty of the United States. The Federal power is thus asserted for the protection of the civil rights and the personal liberty of foreigners, where the same are secured by treaty, in every forum in the country, State or national.

Congress has in a number of cases provided penalties to secure the observance of our international obligations where the latter grow out of the principles of international law. Among such statutes are those enforcing by penalties the duty of neutrality in case of war between foreign nations, and still other statutes assuring by penalties the inviolability of the persons of foreign ministers, their property, and that of their household. The right to enact such legislation proceeds and can proceed on no other or higher authority than that which would sanction penal legislation in aid of treaties. Since the nation has gone so far, it would seem to be rationally deducible therefrom, as suggested by President McKinley, that it has the power to take the one step further necessary to put behind every treaty the force and power and majesty of the National Government.

I now go a step further, and assert that it is the duty of the National Government toward foreign governments to place under the sanction of its penal laws the observance by its citizens of its treaty stipulations. A nation having concluded a treaty with another nation should not only require its observance by that nation, but should be in a position, so far as human prevision allows, to honorably fulfill and execute the treaty on its part. But the execution of treaties in all their provisions is not a matter which can be controlled in every case by the executive of the nation, however willing and anxious he may be to satisfy national obligations. Many treaties have provisions which call for the obedience of the citizen and require his cooperation in their observance. The most common of these provisions and the one most often giving rise to international disputes (and the only one, I imagine, needing penal sanction) is that one, found in most general treaties, extending the right of peaceable domicile to aliens, and assuring to them protection in life and property.

How far the nation is responsible for violation by its citizens of this provision is an open question. In our diplomatic history we have generally insisted on both indemnity and punishment where our citizens have been molested in foreign countries, but have denied our own liability where foreigners have been injured or killed by our own citizens in this country. But there appears to be an unanimity of expression to the effect that connivance by the authorities in the commission of the outrage or failure to take steps to prevent it where possible, and negligence or indifference in bringing the guilty persons to punishment, are features in such cases which fix on the nation liability to make reparation. Cases have not been wanting in this country where the local State authorities have connived at the commission of mob violence against foreigners involving the loss of life and destruction of property, or in which they have failed to take proper steps to prevent the same, and in many cases there has been negligence and indifference in bringing the guilty parties to justice. In the language of President McKinley, "local justice is too often helpless to punish the offenders." In the words of President Harrison, "the Federal officers and courts have no power in such cases to intervene, either for the protection of a foreign citizen, or for the punishment of his slayers." The want of power here spoken of by President Harrison was that arising from the failure of Congress to act and not a want of inherent power in the National Government. The want of power both to protect against outrage and to punish for it when protection has failed must continue until Congress does act in the exercise of its jurisdiction, because neither the marshal with a *posse comitatus* nor the President with the army behind him can intervene of his own motion merely to preserve the peace of the several States; and until Congress acts, that is the only peace that is broken by the commission of outrages on the persons and property of aliens.

In the face, then, of this want of power of the Federal officers and courts to act for the prevention of outrages against the treaty rights of aliens, and of this local justice to which we remit them, "too often helpless to punish the offenders," how can we defend ourselves against the complaints of foreign governments so long as the

National Government, having the right to arm its own officers with power to prevent and its own courts with power to punish outrages on the treaty rights of foreigners, fails, by appropriate legislation, to exercise that right? Is not its failure to so arm its officers and courts a failure to take essential steps for the prevention of outrages, and negligence and indifference in bringing the guilty to punishment, which effectually fixes its liability in every failure of justice under the local law? We certainly ought not to guarantee protection to aliens in our national capacity, and then, having the means to protect them ourselves, turn them over to a jurisdiction often confessedly impotent, and in all cases beyond our power to influence or control. Whatever may be said of our liability by reason of the nonexercise of the Federal power, a failure to exercise that power is not good faith and fair dealing with foreign nations.

Of the many cases in our history where demands have been made on us for indemnity for failure to protect foreigners in their treaty rights, all which were of gravity and importance and were pressed with vigor were settled by the payment of indemnity, but always with a reservation that the payment was made *ex gratia,* and should not create a precedent; but payments have been made so often that it is doubtful if they do not create precedents, notwithstanding the reservations. Behind such payments, made so often, there must have been a recognition of the inherent weakness of the position of the Government. How could it be otherwise when so great a constitutional and international lawyer as Secretary Evarts, in the case of the riots against the Chinese at Denver, was compelled to account for the failure to suppress the rioters and protect the Chinese by urging that "under the limitations of that instrument [the Constitution] the Government of the Federal Union can not interfere in regard to the administration or execution of the municipal laws of a State of the Union, except under circumstances expressly provided for in the Constitution," and in the same communication was compelled to excuse the failure of the United States to interfere with the processes of punitive justice by saying: "It will thus be perceived that so far as the arrest and punishment of the guilty parties may be concerned, it is a matter which, in the present aspect of the case,

belongs to the government and authorities of the State of Colorado." As a question of inherent power in the Federal Government, which was the standpoint from which Mr. Evarts was discussing the matter, the positions taken by him were misleading, if not distinctly and radically wrong. There will be fewer miscarriages of justice, less indemnity to be paid, and greater composure in the minds of our diplomatic representatives if the Government in the future shall give its own courts cognizance of such crimes and arm its own officials with the legal power to prevent them.

Undoubtedly, the exertion of the power by the Federal Government will bring about some confusion in the exercise of the respective jurisdictions of the Federal and State governments in the punishment of crime, and may, in its inception, produce some friction, but this is inseparable from every new assertion of Federal power, and ought not, where the power is certain and the necessity for its exercise imperative, to stand in the way. Moreover, legislation could be drawn in such a manner as to minimize conflicts of jurisdictions and do away with any just cause of dissatisfaction. Of course, criminals and evilly disposed persons and their sympathizers will never be satisfied with any law.

The bill introduced in the Senate of the United States in 1892 and referred to by President McKinley in his message of December 5, 1899, was described by him thus:

> The bill so introduced and reported provided that any act committed in any State or Territory of the United States in violation of the rights of a citizen or subject of a foreign country secured to such citizen or subject by treaty between the United States and such foreign country, and constituting a crime under the laws of the State or Territory, shall constitute a like crime against the United States and be cognizable in the Federal courts.

In a bill so generally drawn it would be difficult to affix penalties for the several offenses which might come within its provisions, and I presume the State penalties were adopted along with the State crimes which the bill adopted. There is grave doubt whether such a measure, if adopted by Congress, would be valid. Congress can not delegate its constitutional power to legislate to the several State

legislatures. It must itself denounce those things which it purposes shall constitute crimes, and must itself determine the penalties to be affixed to them. Under the operation of the Senate bill before referred to a particular act might be an offense in one State and not in another; it might be subject to different penalties in different States, and these matters would be changing all the time with the varying legislation of the States. A State might (though that is an extreme case and hardly to be supposed) defeat conviction in a Federal court after the commission of the crime by repealing the criminal statute. The plan of the bill seems objectionable from every point of view. The acts of violence and aggression which may be committed against the treaty rights of foreigners, and which it would be desirable to punish in the Federal courts, are few in number and easily classified. They would be embraced under the head of murder in its various degrees, assault with intent to commit murder, aggravated assault, malicious destruction of property, and possibly laws against unlawful and riotous assemblies with intent to commit any of the offenses enumerated. A bill denouncing these several crimes, describing them with technical accuracy, when committed against any person a citizen or subject of a foreign country, in violation of a right secured to such citizen or subject by treaty between the United States and such foreign country, and affixing a proper penalty in each case, would be invulnerable to attack, and should, I think, be the form of legislation adopted. If, for any reason, this method of proceeding should be considered objectionable, the form of statute employed for crimes against the elective franchise and civil rights of citizens, found in chapter 7, title "Crimes," Revised Statutes of the United States, might be employed, and would no doubt be effective for all practical purposes. Section 5508, found in that chapter, denounces the crime of conspiracy to injure, oppress, threaten, or intimidate any citizen in the exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, and affixes a severe penalty to the commission of the crime. Section 5509 provides that if in the act of violating the preceding section any other felony or misdemeanor be committed the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed. This last section is subject to the

objections made to the Senate bill referred to by President McKinley in his annual message to Congress. It has never passed the scrutiny of the Supreme Court of the United States, and the wisdom of employing it in Federal legislation is doubtful. It might be adapted, however, to constitutional requirements. It would not be objectionable to identify and define the offenses to be proceeded against under the Federal law, by reference to the local law in force at the time of the commission of the offense, selecting those common and general in all the States and Territories and most necessary to be guarded against, as murder in its several degrees, manslaughter, and the several forms of aggravated assault. But the adopted offenses should each have its appropriate penalty specifically provided by the Federal law. Minor offenses would be left to the exclusive jurisdiction of the State tribunals, and even those of a major character, when not growing out of race prejudice or committed by mob violence, and therefore not likely to go unpunished by the local law, could be left to take their course in the State courts. The authorities seem to establish that the same act may constitute an offense both against the law of the State and against the law of the nation, and that proceedings had in the one jurisdiction under its peculiar law constitute no bar to proceedings in the other.[1]

The jurisdiction first attaching in such cases would, no doubt, inhere to the end, but when the end had come, if it had proven barren of results, the other jurisdiction could be invoked and a result sought more in keeping with the demands of justice. With such legislation we would have an efficacious system, not burdensome to the Federal courts, under which the National Government could meet all its treaty obligations — acknowledging its fault when in fault and making reparation, and standing on its own record, made by its own officers and its own courts, when it felt that it had honorably met all international requirements.

[1] U. S. v. Marigold, 9 Howard, 565; Fox v. Ohio, 5 Howard, 410; Moore v. People, 14 Howard, 17; United States v. Barnhart, 22 Fed. Rep., 285; *Ex parte* Siebold, 100 U. S., 389; Cross v. North Carolina, 132 U. S., 389; Campbell v. United States, 4 Fed. Cases, 1203; United States v. Avery, 24 Fed. Cases, 811; United States v. Givens, 25 Fed. Cases, 1331; United States v. Wells, 28 Fed. Cases, 523.

STATUTES SUGGESTED BY MR. TURNER RELATIVE TO PROTECTION OF ALIENS

I.

SECTION. 1. If two or more persons conspire to injure, oppress, threaten, or intimidate any person, a citizen or subject of a foreign country at peace with the United States, with which country the United States shall have a subsisting treaty, in the free exercise or enjoyment of any right or privilege secured to him by such treaty, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, a citizen or subject of a foreign country at peace with the United States, to prevent or hinder his free exercise or enjoyment of any right or privilege so secured to him, they shall be fined not more than five thousand dollars and be imprisoned not more than ten years.

SEC. 2. If in the act of violating any provision of the preceding section any person, a citizen or subject of a foreign country at peace with the United States, with which country the United States shall have subsisting a treaty stipulating for protection to the life and person of citizens or subjects of such foreign country, shall be killed, or injured in his person, under circumstances which would make the offender guilty of murder in any of its degrees, or of manslaughter, or of assault with intent to kill, assault with intent to murder, assault with a deadly weapon, or of aggravated assault, under the existing laws of the State or Territory where the offense is committed, then the offender shall be guilty of like offenses under the laws of the United States and shall be punished for the same as follows:

For the crime of murder in the first degree the offender shall suffer death.

For the crime of murder in any lesser degree, or of manslaughter, the offender shall be punished by imprisonment in the penitentiary for not less than five nor more than twenty years at the discretion of the jury.

For the crime of assault with intent to kill, assault with intent to murder, assault with a deadly weapon, and of aggravated assault, the offender shall be punished by a fine of not more than five thousand dollars or by imprisonment in the penitentiary not to exceed five years, one or both, at the discretion of the court.

II.

Every person who shall, within any State or Territory of the United States, purposely and of deliberate and premeditated malice kill another, a citizen or subject of a foreign country at peace with the United States, with which country the United States shall have subsisting a treaty stipulating for the protection and security to the life and person of citizens or subjects of such foreign country while lawfully in the United States, shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death.

Mr. GEORGE GRAY, of Wilmington, Delaware. Mr. President: Nothing but the importance of this topic would impel me to ask a question of the gentleman who has so ably discussed it. I think we all recognize its importance.

The proposition, as I understand it, is that the Federal Govern-

ment should take upon itself the enforcement of certain rights supposed to belong to aliens in the States where they are resident, by virtue of treaties between this Government and the countries from which such aliens have come. Such a proposition should receive careful consideration. I therefore would like to ask Senator Turner, to whom I have listened with great interest, whether he understands that the scheme which he is discussing and approving involves legislation on the part of the Federal Government that shall turn over to Federal courts the jurisdiction of all offenses or crimes against the person, property, or safety of aliens from countries with whom we have treaties guaranteeing in general terms like treatment of their subjects and citizens with the citizens of our own country? Does he think that such a treaty obligation as I have indicated makes it necessary or proper to turn over to Federal courts the administration of the criminal jurisdiction as heretofore existing in the States, wherever it may concern offenses committed against the person or property of such aliens who have been incorporated into the mass of the population of the several States, and who constitute a part, so to speak, of the community thereof?

Mr. GEORGE TURNER, of Spokane, Wash. Mr. President: I suggested in the paper just read two alternative forms of legislation, and indicated very briefly one of the alternatives in mind, namely, the passage of a statute denouncing the crime of murder for the killing of any foreigner lawfully in this country with whose government the United States has subsisting a treaty guaranteeing to it the security of the lives and persons of its citizens, and denouncing as crimes lesser forms of violence on the persons of such foreigners. This, of course, would necessarily involve an assertion of Federal jurisdiction in every case where, by mob violence or otherwise, a foreigner had been killed or injured in such manner as to bring the statute into play. But I suggested further (and the suggestion to some extent meets the objection of Judge Gray) that while the Federal Government might put such a law on the statute books, the law itself would not supersede that of the States for the punishment of the same character of crimes, nor would the commencement of

proceedings under it oust the jurisdiction of the State courts if the State courts were the first to obtain jurisdiction. The same act would constitute a crime both against the State and the nation, and the jurisdiction first attaching, by virtue of the possession of the offender and the institution of proceedings for his punishment, would inhere to the end. I do not think any very great conflict between the States and the nation would ensue by reason of such legislation. There are already a number of crimes as to which there is concurrent jurisdiction in the State and national tribunals, and that situation has not thus far occasioned serious complications.

Mr. GEORGE GRAY. Mr. President: The Senator has made a very interesting argument, in asserting the power of Congress to enact such legislation. As to the expediency, however, of such legislation, I desire to say that the proposition seems to me to ignore the genius of our dual form of government, and the sovereign character of the States, in all that concerns their criminal jurisdiction. Nothing seems to me more vitally important to our constitutional scheme than the preservation, in their integrity, of the police powers reserved to the States. Any impairment of, or encroachment upon, those powers detracts by so much from State sovereignty, and measurably weakens the foundations of local self-government, upon which our institutions largely rest. In the practical workings of the Federal and State governments during all our past history, there has been an assumption not only of the plenary authority, but of the plenary competency of the State governments, by the enactment and administration of their own criminal laws and the exercise of their police powers to maintain peace and good order within their borders, and to wholesomely regulate all matters concerning the health, comfort, and well being of the people thereof. It would be a disturbing factor, and would unnecessarily impair the respect in which the criminal jurisprudence of a State is and ought to be held, to introduce a discrimination between aliens and citizens in the administration of the State's criminal laws and its police authority. The States themselves can not make — indeed, they are inhibited by constitutional restraints from making — such discrimination, and the whole body of their criminal and police jurisprudence is applicable to all residents alike.

Why, then, should we single out from the mass of the population now equally amenable to these laws aliens as a favored class, and withdraw them from the control of State laws, to which all citizens and residents are alike subject? To do so seems to me to be an imputation upon the integrity of the State autonomy and upon the reputation and character of a State judiciary, and the competency of the people of the several States for local self-government. It tends to degrade the States and their judicatories in the eyes of the world, and to fix upon them, in our dealings with other countries, a status of provincial subordination unknown to our constitutional scheme of government, and abhorrent to the genius of our institutions.

The legislation thus proposed has no analogy to those criminal statutes of the United States which define and punish violations of its own laws, and which are necessary to maintain in their full vigor the delegated powers of the General Government. Though discussing only the expediency, and not the constitutionality, of such legislation, I may be permitted to observe that I have always believed that, large and ample as the treaty-making power conferred by the Constitution upon the President and the Senate undoubtedly is, it must be construed with reference to our general form of government, and be subordinated to its requirements. I venture to assert that a treaty which, either directly or by the implication of any of its stipulations, ignores the existence of the States, which in their union form this nation, is beyond the power of this Government to make.

Why should the Federal Government, in the exercise of its treaty-making power, undertake to give to aliens resident in the several States of this Union any other rights than those possessed by the citizens of those States, with respect to the administration of their criminal laws?

Notwithstanding those lamentable instances in which mobs have threatened the lives and safety of aliens — notably on our western coast, where individuals of the Asiatic race have been subjected to attack — I think we can say that our States have been as jealous in their administration of their criminal laws for the protection of all

classes of citizens and residents as Federal courts are likely to be. Judges, whether Federal or State, are selected from the same community, and the juries would be drawn from the same vicinage, whether the trial was in a State court or a Federal court. The Executive Federal Government could no more interfere with the orderly procedure of one court than with the other. If mob violence can not be suppressed by the State executive, he may call upon the Federal Executive to exercise the national power in his aid. I always think that the proper attitude was taken by the Premier of England on a notable occasion, when an Austrian statesman, unpopular for some reason on account of his public conduct at home, was mobbed in London. When redress was asked for by his home Government, the reply was made that the redress must be sought in the ordinary courts of the country to which all British subjects and all residents of the Kingdom were alike amenable.

I believe that when this Government, in the exercise of its treaty-making power, guarantees the citizens or subjects of a foreign country equal rights and equal protection with our own citizens, they mean that the existing courts, State and Federal, are open alike to all, and that when the "courts of our country" are spoken of in diplomatic intercourse the State courts, in their proper spheres, as well as the Federal courts, are included in that phrase. The State courts are the "courts of our country" in every sense of that word, and the Federal Government, constituted and supported by the States, may well be looked to to guarantee the integrity and impartiality of the State courts as well as of the Federal courts.

Let us go slowly, then, in disturbing the existing situation.

Now one word more. This seems to have been the sense of the Congress of the United States on two different occasions — in 1892 and in 1899, I think it was — when certain legislation was urged upon Congress by two such Presidents as Harrison and McKinley, men who are respected throughout the country, without regard to partisan politics, for their high character and eminent services. Congress did not see fit, after debate and discussion, to act upon these suggestions, not denying perhaps the necessity of some legislation, but not willing to go so far as was suggested by the honorable gentleman who has just taken his seat.

Mr. ROOT. Mr. Sherley, who has been present during the delivery of the paper that has been so admirably presented, is in attendance at the meeting, and as he has presently to attend the session of the House, before calling upon the next paper upon this subject, to be read by Mr. Lansing, I will ask that Mr. Sherley speak on the subject, and as I have also to meet a Government appointment, I will ask Mr. Foster to take the chair, and I will meet the members of the Association at half-past two o'clock.

Mr. SHERLEY, of Louisville, Ky. Mr. President and Gentlemen: The question suggested by Judge Gray, as to the advisability of doing what has been shown by the first speaker as within the power of Congress to do, raises a very interesting subject, and I shall allude to that briefly, and then tell you of the present status of the proposed legislation inaugurated by myself in a previous Congress and again in this Congress.

I have been noted rather as a stickler for States' rights and come from a country where the doctrine is more or less popular, but I believe there is one fundamental answer to the proposition suggested by Judge Gray, and that can be put into the form of a sentence — that where there is responsibility there there ought to be power. Now, whenever there is any trouble growing out of injuries to aliens resident in America, no foreign country looks to the State or locality where that injury has occurred, but it naturally looks to the nation that has guaranteed certain rights to that alien, and to my mind it is not a proper answer for the United States to say that we have the power to give rights but no power to enforce their observance. I do not believe that it will be necessary to enter into any detailed plan for giving the Federal courts jurisdiction of every minor offense that might arise as against an alien; it can very simply be done so as to cover those important cases which would be the subject of international concern.

In the case of Baldwin v. Frank, the question of the power of the United States was clearly indicated. It can hardly be said to have been adjudicated, but almost so, because it was a necessary predicate, you might say, to what was further said and decided by

the court. That case grew out of an indictment of certain Californians who had conspired against a Chinese subject, resident in California, during a time of excitement in that State, due to the feeling against the Chinese. The men were indicted under sections 5519 and 5508 of the Revised Statutes, as I now recall. The case went to the Supreme Court of the United States, and the Supreme Court held that section 5519 was unconstitutional, following the Harris case, and then, though holding that section 5508 was constitutional — it having been repeatedly so determined — decided that by its terms it did not embrace the case of an alien, because, as the lawyers here present will recall, that section provides that if two or more persons injure, oppress, threaten, or intimidate any citizen in the free enjoyment or exercise of any right guaranteed under the Constitution or laws of the United States, they shall be punished, etc.

The Supreme Court held that the word "citizen" was used in a narrow sense and applied to citizens only and not to aliens, and that therefore the section was not applicable, but the court held and stated clearly that the power of Congress to legislate making an offense against aliens punishable was clear and beyond doubt. So that three years ago I introduced in the House a bill which changed section 5508 simply by striking out the word "citizen" and inserting the word "persons." The theory — and it somewhat reaches the proposition advanced by Judge Gray — was that it was a conspiracy section and would deal only with those offenses that arose to the dignity of a conspiracy, and that an attack on an alien by an individual, while it might be very grave in its consequences, hardly presented a condition of affairs where it would be necessary for the Federal Government to take jurisdiction. I do assume, however, that there can be a condition of affairs in a State when sentiment is such that by virtue of mob spirit and mob action many acts can be committed of great magnitude, and that such acts ought to be within the cognizance of a Federal court and punished by a Federal court, when there is a violation of the rights of aliens.

So that this bill was introduced in that form. It also avoided another difficulty. There has been and will continue to be, for a

great many years, difference of opinion as to what rights can be conferred upon aliens by the Federal Government. Those who belong to the strict school of construction, like myself, are not willing to concede that the rights that are frequently claimed can be created by treaty can be given; we are not willing to concede that some of the rights claimed in the recent cases that arose in California could be given, and so I did not deem it wise to bring that question into the consideration of this matter in Congress, and provided simply that the violation by conspiracy of a right should be punished, leaving it to the courts to determine, as they must determine in the final analysis, what rights can be given, and when they have been violated.

Now, there is but one objection in my mind to such a statute, and that objection will apply equally well to section 5508 — this old civil rights statute; for it was one of the original sections of the civil rights act — and that is that a criminal law should be specific and definite, but under the constructions that have taken place relative to section 5508, and the form of a sufficient indictment, no harm can come to the individual under such a section, and it gives you a law elastic and sufficient to meet the cases as they occur.

There were two suggestions made by Senator Turner that I believe have been passed upon, and contrary to the view he presented, and it may be interesting to notice them. Congress has undertaken several times to make the laws of a State Federal laws, and such power has been upheld, the Supreme Court holding that such action by Congress adopted the law of the State at the time the Federal act was passed, so that if there was a subsequent change of the State law — even a repeal of the State law — it did not change the Federal law. Section 5509, which is an addendum, so to speak, of section 5508, has been upheld by the Supreme Court of the United States in several cases. That section provides that if in the carrying out of the conspiracy mentioned in section 5508 any offense shall be committed which is punishable by the State law, a similar punishment shall apply to those engaged in the conspiracy.

Now, in conclusion, it may interest you to know that my bill was referred to the Department of State and received its very cordial indorsement, and has recently been reported, with a slight amend-

ment, by a unanimous vote of the Judiciary Committee of the House. The amendment substitutes the word "alien" for "person" and confines the statute to injuries to rights given by treaty instead of using the words "Constitution or laws of the United States." The change is practically one of form and met with my approval. The bill is now on the calendar, and while it is too late at this session to hope for legislation by the House, I have reason to hope that before the Sixtieth Congress dies the House will pass the bill, although there is urged by some members the objection that has been voiced by the distinguished Judge [Justice Gray], that it would give to the Federal Government control over matters that ought to remain with the States. The answer, I repeat, must be that "where there is responsibility there there ought to be power."

Mr. GEORGE GRAY. Mr. President: I only want to say to the gentleman who has given us the comfortable assurance that the legislation now proposed in Congress will be upon such safe and well-guarded lines as he has indicated, that I am making now no objection on the score of power, but I think that the Federal Government is responsible to all the world for our form of government. It is in a certain sense responsible to the State governments, to represent them and their citizens in all that concerns foreign relations. The States have no other form of representation in this respect, and I think we should be content that the Federal Government should be so far sponsor for the States as to pay indemnity for their failure (if it is asserted and proved) to properly vindicate the rights of those residents who happen to be aliens.

Mr. SWAGAR SHERLEY. If the Judge will permit a question in return: When the Federal Government is arraigned by a foreign government for its failure to protect an alien to whom a right has been given, not by a State but by the National Government, and where there has been not only no protection but no punishment of the wrongdoer — what answer could the United States Government give? Shall it simply plead that, under our dual form of government, we must leave to the States, not those things which belong to the States, but the upholding of rights created, not by any State, but by Federal action?

Mr. GRAY. The question involves a good deal. I am not willing to admit that such rights, as the gentleman supposes, can be created by treaty. Certain obligations may be imposed by treaty upon all persons within our borders, to refrain from certain acts injurious or unfriendly to a treaty power, and we have legislation on our statute books to punish such acts, and Federal courts are invested with jurisdiction therefor; for example, our neutrality acts and acts to prevent filibustering. But these are very different from the legislation proposed. It depends upon the character of the right sought to be enforced. I do not think the Federal Government is derelict in its duty to any foreign country when it says, in effect, that the great mass of police powers are committed to the State sovereignties, and in this respect it represents them. Lord Palmerston said to Austria: "Your subjects must go to the courts where all Englishmen go." We say: "You must go to the courts where all Americans go" for the ordinary protection given by the police power.

Mr. SHERLEY. It does not take exclusive jurisdiction; it takes a jurisdiction only in the same way that it would take it as to an American. If an American has a Federal right and the State court does not enforce his right, the Federal court enforces it. For instance, if a negro is deprived of a right, on account of his race or color, under this very section 5508 the Federal court enforces that right.

Mr. GRAY. That is a very apt illustration. But how could you embody in an indictment the allegation that an alien was deprived of a right, *qua* alien, or that the assault was made upon him because he was an alien? The negro has rights secured to him by the constitutional amendments, and Congress is expressly authorized to enforce them by appropriate legislation.

The CHAIRMAN (Mr. John W. Foster). Gentlemen, I think that while this discussion is very interesting it would be more appropriate after the second regular paper is read and the matter is open for general discussion.

I want to make a few announcements before the next paper is read, especially with regard to the reception this afternoon by the President. The Secretary suggests that it would be more convenient for

the members who expect to attend the reception if they should meet here and go in a body to the White House; it is a very short walk from here and we could go at two o'clock. The tickets can be obtained at the Secretary's office, as has already been explained, as also the tickets for the banquet to-morrow night. The meeting this afternoon will be called at half-past three o'clock, and at half-past four o'clock there is to be a meeting of the General Council. It is a very happy indication of the general interest of the country at large in this Society that we have had so distinguished a person as Senator Turner to come all the way from the Pacific coast to give us this admirable paper which he has read to us this morning. The next paper will be by Mr. Lansing on the same general subject.

ADDRESS OF MR. ROBERT LANSING, OF WATERTOWN, N. Y.

Mr. Chairman, Ladies, and Gentlemen: It is a year and a half since the San Francisco authorities undertook to segregate the children of Asiatic parents in separate schools, and by doing so involved the United States in a controversy with Japan, whose Government protested against this racial discrimination. Though the feverish utterances of the press of this country as to the imminence of war with Japan were absurd, as Secretary Root pointed out in his address before the American Society of International Law in April, 1907, and though the difficulty was satisfactorily removed through a conference between the interested parties, the event has caused thoughtful Americans to consider the possible results, if the municipal government of San Francisco had refused to modify its policy. For a year the questions to which this hypothesis has directed attention have been the subject of frequent discussion. They involve the fundamental principles of our political system, the proper spheres of Federal and State authority, the constitutional powers and limitations of the National Government, and the international responsibilities of the United States, which are imposed upon its Government as the repository of the treaty-making power.

All these various phases of the subject may be gathered into the

question, What obligation, according to the principles of international law, is there upon the United States to protect domiciled aliens in their rights, whether springing from treaty stipulation or natural justice; and what authority does the Federal Government possess under the Constitution to perform such obligation if one exists? The first half of this question is international in its scope; the second half, national. The first deals with principles that govern the intercourse between nations; the second, with the organic law of the Federal Union.

While it must be admitted that each state of the world is the judge of its own international rights and obligations, and the enunciator of its own code of international law, there are certain principles so fundamental in character and so universally recognized that they may be deemed axiomatic and without modification binding upon every state. Such is the principle that a nation is sovereign and independent, and that the government, the agent of the sovereign of the nation, has authority to demand its rights and to perform its duties in regard to other nations. Whatever may be the restrictions placed upon a government by the sovereign power through the medium of constitutional enactment, these are of no moment to other governments; so far as they are concerned the former, as the representative of the sovereign, is clothed with full powers to fulfill the obligations which natural justice imposes on an independent state. It is, therefore, no valid excuse for failure to perform an international duty to assert that the government's authority is limited by constitutional provisions, for the sovereign's responsibility is not lessened. If sufficient powers have not been delegated to the government, the sovereign is at fault, and other states may justly complain and even compel the delinquent to fulfill its obligations.

The justness of this principle and its necessity to the stability of international order is too apparent to require demonstration. If it did not prevail, any state might by its constitution deprive its government of political powers sufficient to meet the most common obligations due to other governments, thus furnishing its department of foreign affairs with the plea of want of authority in excuse for failure to comply with the just demands made upon it. Clearly no state can,

for its own sake, afford to assume such a position; nor can it, for the sake of other nations, be permitted to do so.

When, however, this principle, which fixes upon a state international responsibilities, which its government, whatever may be its constitutional limitations, is bound to recognize and to fulfill, is applied to the Government of the United States, there is a confusion of duties and a conflict of authorities. These arise from the American political system, by which there is a division of powers between Federal and State governments. By reason of the fact that at the time of the formation of the Union each State possessed its own criminal code and an organized police it was assumed that the protection of individuals and of private property was a duty of the State governments. It was the expedient course to pursue. Whether the Federal Government possessed the constitutional right to exercise the police power in regard to aliens has never been judicially determined. Following the system instituted at the beginning of our national life Congress has never asserted Federal authority in this sphere of government by the enactment of penal statutes, but has left to the States the care of the life, liberty, and property of individuals, both native and foreign. Under existing conditions, therefore, and in the absence of legislation by Congress, the Federal Government is impotent to compel a proper exercise of the police power in the protection of aliens and in the punishment of crimes against them, and at the same time under the accepted practice of nations it is responsible to other governments for such exercise in regard to their nationals domiciled in the United States.[1]

To harmonize the international rule of responsibility and the want of authority in the Government of the United States, under the practice which has prevailed so long, to perform the obligations growing out of such responsibility has been a difficult and vexatious task for American statesmen during the past fifty years. How well

[1] In the United States v. Hudson, 7 Cranch, 32, it is held that as there is no common law of crimes in our Federal jurisdictions an indictment will not lie in the absence of a statute for the violation of international law or of a treaty of the United States, notwithstanding that such violation of law or infraction of treaty rights may subject the United States to international reclamations. See also the opinion of Chief Justice Fuller in Baldwin v. Frank, 120 U. S., 678.

they have succeeded in their endeavors, and how sound the policy which they have maintained, the review of a few cases will demonstrate.

Before entering upon such a consideration it is necessary to point out that the subject presents two classes of cases. To one of these belong the controversies which have arisen from the failure of foreign governments to protect from wrong American citizens or to punish those who have done the wrong; the other class embraces those cases which have to do with the failure of public authorities in the United States to protect aliens domiciled in this country in the enjoyment of their rights or to punish those who violate them. It is also essential to note that there must at least be negligence on the part of public officials, either police or judicial, so gross in character that it could have been avoided with reasonable care. If normal police protection has been furnished, and justice has been duly administered, no claim will lie against a government for crimes perpetrated against foreign residents by private individuals.

In the class of cases relating to the treatment of American citizens in foreign lands, the doctrine held by the United States Government is laid down in a report made to the Secretary of State in 1885 by Dr. Francis Wharton, then the law officer of the State Department.

"The government," he says, "[of a foreign state] is liable not only for injury done by it, or with its permission, to citizens of the United States, or their property, but for any such injury which by the exercise of reasonable care it could have averted." [2]

Secretary Fish declared the other proposition which relates to this class of cases:

The rule of the law of nations is that the government which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor.[3]

Bearing these two general propositions in mind, let us turn to some specific cases illustrative of their application.

[2] Foreign Relations, 1885, p. 212.

[3] Moore, International Law Digest, Vol. VI, p. 655.

In 1894 Mohammedan fanatics destroyed several school buildings at Harput and Marash which belonged to American missionary societies. Mr. Terrell, the minister of the United States at Constantinople, presented the cases to the Ottoman Government and demanded an indemnity on the ground that the police and soldiery had connived at, if they had not actually assisted, the rioters in the work of destruction. The Turkish Minister for Foreign Affairs replied that "the local authorities and imperial troops" had made every effort to protect American lives and property, and therefore his Government was not obligated to indemnify the victims for their losses. He also affirmed that the outbreak was in the nature of an insurrection, and that for wrongs perpetrated by insurgents his Government was not liable. Neither of these reasons, if true, would have been sufficient to relieve the Turkish Government from responsibility.

Secretary Olney, after denying that a mob of religious fanatics constituted an insurrection, and after adducing evidence to show that "the premises of Americans were inadequately guarded" and that the Turkish troops had not interfered with the mob, stated:

> The negligence of the authorities and the acts of their agents are here in question, not the deeds of the Kurds, nor still less of the supposed Armenian rebels on whom the Porte seems to seek to throw the responsibility for these burnings and pillagings.[4]

The position thus taken by the United States was maintained and the claims pressed with vigor; and finally in 1900 the Ottoman Government recognized the obligation by paying a lump sum in settlement of these and other demands.

In the correspondence regarding other claims, which grew out of crimes committed in Turkey during this same period of unrest, Secretary Sherman, replying to the declaration of the Porte that it would not admit the principle that it was liable for claims "arising out of the disorders which took place in certain localities of the Empire," replied:

> In every case of this kind the Turkish Government either ignores or distorts the abundantly supported contention of this Government

[4] Foreign Relations, 1895, pp. 1340–1447; *ibid.*, 1896, pp. 880–898.

that the injuries to American property during the recent disorders were suffered through the insufficiency of the protective measures afforded. A government being able to quell and not quelling such disorders, and damage to American property having resulted, the United States contends that Turkey can be held responsible under a well-recognized principle of international law.[5]

There are two points worthy of particular attention in this correspondence: First, the defense of the Turkish Government that it could not be held responsible for the failure of local authorities to suppress lawlessness; and, second, the assertion of the Secretary of State that the ability of a government to protect the persons and property of foreigners and the failure to do so make a government responsible for wrongs perpetrated. The position taken relates to alien rights flowing from the general principle of international law and not to rights secured by treaty, which latter a government has bound itself to respect by specific agreement.

Turning now from a government's neglect to protect American citizens to its neglect to prosecute those who have violated their rights, we will find the United States has been equally insistent in holding the delinquent government responsible for such failure. The following are sufficient to illustrate the doctrine.

In 1894 Frank Lentz, an American citizen, was murdered in Kurdistan. An investigation by some of his friends established the fact that the crime had been committed for the sake of robbery and five or six Kurds and Armenians were arrested and brought to trial. The Turkish court declared, however, that, although the prisoners had murdered Lentz, they had done so "without premeditation." The sentences imposed were short terms of imprisonment, which were never served, as the criminals were permitted to escape. The Department of State, convinced of the willful miscarriage of justice by the Turkish authorities, presented through the American minister a claim against Turkey on behalf of Lentz's parents. To this demand the Porte replied that, as Lentz was traveling alone on a bicycle through a remote and lawless region, Turkey could not be held responsible for his death resulting from so hazardous a journey. To this defense

[5] Foreign Relations, 1897, p. 592.

Secretary Hay replied that, while appreciating the force of this argument, the liability of the Turkish Government arose from the fact that his murderers had not been duly punished.

> The evidence showed [he declared] a deliberate, premeditated murder, yet the judgment was rendered against the murderers as for "murder without premeditation" under the 174th section of the criminal law. And even this penalty was not actually inflicted, for the guilty parties escaped. It is hoped, in view of the enormity of the offense and the miscarriage of justice, that the Turkish Government will pay a reasonable indemnity.[6]

As a result of these representations Turkey recognized its liability and two years later paid a substantial indemnity.

Another illustration of the application of the doctrine that the United States holds a foreign government responsible for a failure to punish those who have committed a crime against an American is the "Renton Case." The facts are as follows: Charles W. Renton in 1888 settled on land granted to him by the Honduran Government. Disputes arose between Renton and the members of a company, which held concessions in the region, that in 1894 culminated in an attack on Renton's plantation, in which his house was burned and he himself taken prisoner. After being held in confinement for a few days he disappeared and was never seen again. There was no doubt but that he was murdered by his enemies. At the instance of Mrs. Renton, who had been expelled from Honduras by the rioters, the United States minister laid the case before the Honduran Government, and upon its failure to act a United States naval vessel was sent to the place where the crime was committed to investigate the affair. The naval commander reported that the Honduran authorities had made practically no effort to apprehend the criminals and that undoubtedly the officials had been corrupted. The United States immediately demanded that the guilty parties be promptly punished, and the Government of Honduras promised to do so.

Seven of the men engaged in the affair were arrested and brought to trial before a jury on the charge of assassinating Renton. The

[6] Foreign Relations, 1895, pp. 1257–1414; *ibid.*, 1899, p. 766.

verdict was that there was no evidence to prove that Renton was dead, that four of the prisoners were of "irreproachable character," and that three were guilty of wounding Renton in "attempting" to assassinate him. The latter were sentenced to terms of imprisonment and to pay certain sums "for curing" their victim and to "supply food" for him and his family while he was incapacitated by his wounds. The fact that Renton was dead made the sentence absurd. Bribery and intimidation without doubt affected the verdict and sentence. The condemned appealed from the judgment, and on account of the laxity of the authorities all but one had escaped from Honduras before March, 1897. From beginning to end the judicial proceedings were farcical.

In 1904 Secretary Hay reopened the case, demanding pecuniary damages from Honduras. The grounds for this demand he stated thus:

> There was an inexcusable delay in initiating a judicial investigation. The first proceedings were partial and one-sided. The subsequent judicial proceedings, which were the direct result of the naval investigation by the U. S. S. *Montgomery,* terminated in condemning for minor offenses persons who, the evidence before the Department shows, were guilty of a deliberate and brutal murder. And finally, soon after the decision of the supreme court, all of the murderers, with the single exception of Dawe, were permitted to escape.

So evident was the miscarriage of justice that the Honduran Government admitted its liability and agreed to pay 78,600 pesos in settlement of the claim.[7]

These cases are sufficient to show the policy of the United States in dealing with foreign governments who have failed to protect American citizens in their rights and to punish those who have violated them. Let us now examine the question from the standpoint of claims preferred against the United States for similar failures of the police and judicial authorities in regard to aliens domiciled in this country.

The first assertion of the policy which has been so generally followed by the United States was advanced by Secretary Webster in

[7] Moore, International Law Digest, Vol. VI, pp. 794–795.

the case of riots against Spanish subjects at New Orleans in 1851. He declared that foreigners "are protected by the same law and the same administration of law as native-born citizens" — that is, by State laws and State authorities. The sufferers were referred by him to the Louisiana tribunals for redress, but public opinion was so strongly in favor of the rioters that no justice could be obtained. Congress ultimately made an appropriation covering the losses which the Spaniards had sustained, but Mr. Underwood, of the Senate Committee on Foreign Relations, was careful to explain that it was "a boon" granted in recognition of the magnanimity of the Queen of Spain in liberating individuals captured during an insurrection in Cuba.[8] While there is no direct denial of Federal liability, the language of Mr. Webster and the statement of Mr. Underwood are sufficient to indicate the doctrine which was more fully developed by later Secretaries of State.

In 1880 a mob at Denver, Colorado, attacked the Chinese residents of that city, killing one, injuring many, and wantonly destroying a considerable amount of property. The Chinese minister at Washington, in directing the attention of the United States Government to the affair, asked that it should protect the Chinese in Denver and punish the guilty, adding that it would seem just that the owners of the property destroyed should be compensated for their loss. In reply to this request Secretary Evarts said:

As to the arrest and punishment of the guilty persons who composed the mob at Denver, I need only remind you that the powers of direct intervention on the part of this Government are limited by the Constitution of the United States. Under the limitations of that instrument, the Government of the Federal Union can not interfere in regard to the administration or execution of the municipal laws of a State of the Union, except under circumstances expressly provided for in the Constitution. Such instances are confined to the case of a State whose power is found inadequate to the enforcement of its municipal laws and the maintenance of its sovereign authority; and even then the Federal authority can only be brought into operation in the particular State, in response to a formal request from the proper political authority of the State. It will thus be perceived

[8] House Ex. Doc. Nos. 2 and 113, 32d Cong., 1st sess.; Cong. Globe, vol. 24, part 2, p. 2241.

that so far as the arrest and punishment of the guilty parties may be concerned, it is a matter which, in the present aspect of the case, belongs exclusively to the government and authorities of the State of Colorado.[9]

Mr. Evarts advanced this defense again in the case of Tunstall, an Englishman, who was murdered in New Mexico. In reply to the British minister's claim for indemnity, based on the fact that a deputy sheriff was involved in the murder, Mr. Evarts said:

> The laws of the various States and Territories of the Union for the punishment of crimes committed within those several jurisdictions are administered and executed in these several independent jurisdictions by their respective local tribunals and officers free from any control or interference of the Federal Government.[10]

In the foregoing cases, however, negligence on the part of the authorities was not proven and they are only referred to in order to show the position taken by the United States, which is so clearly stated by Secretary Evarts. In the riots which took place at Rock Springs, Wyoming, in 1885, in which twenty-eight Chinese were killed, fifteen wounded, and $150,000 worth of their property destroyed, the Chinese minister, in presenting a claim to the Department of State, charged that the authorities made no attempt to suppress the rioting, that the inquest was described as a "burlesque," and that according to reliable reports none of the offenders was likely to be apprehended and punished.

Secretary Bayard's defense was elaborate and technical. In substance it came to this, that the United States was not liable for losses resulting from lawless acts which the Federal officials had no constitutional power to prevent or to punish, that the local courts were open to the sufferers, who might seek redress there, and that the duty to bring culprits to justice belonged exclusively to the State authorities. Having thus declared the doctrine of his Government as to the limitation of Federal responsibility, Mr. Bayard stated that the President, though he denied "emphatically all liability," would recommend to Congress to grant pecuniary relief to the sufferers,

[9] Foreign Relations, 1881, p. 319.
[10] Moore, International Law Digest, Vol. VI, p. 663.

" not as under obligation of treaty or principle of international law," but out of " a sentiment of generosity and pity " for the Chinese who were " so shockingly outraged," and because of " the gross and shameful failure of the police authorities of Rock Springs in Wyoming Territory to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law or punish criminals, or make compensation for the loss of property pillaged or destroyed." While thus admitting facts which constituted grounds for a claim as strong as can be found in the annals of international intercourse, the Secretary of State stated that the President would make the recommendation to Congress " with the distinct understanding that no precedent is thereby created." [11]

When the bill for an appropriation in compliance with the Presi-

[11] Foreign Relations, 1886, p. 158.

The doctrine maintained by the United States forced its Government to make some very fine-spun distinctions as to what constituted or did not constitute a ground for claiming national liability for the acts of local authorities. An excellent example of this sort is the case of William Scott Smyth, an American citizen, who in 1874 presented a claim against Brazil for damages arising out of mob violence. The facts were admitted, but the Brazilian Government denied its accountability for them on the ground that the Province where the wrong took place was alone answerable. In meeting this denial Secretary Fish said:

" It is the Imperial Government at Rio Janeiro only which is accountable to this Government for any injury to the person or property of a citizen of the United States committed by the authorities of a Province. It is with that Government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject, who, in this country, might be wronged by the authorities of a State."

Had the Secretary of State stopped here the United States might have been freed from a position which has aroused the criticism of publicists and the complaint of foreign governments. But, following the suggestion of Mr. Webster, he continued:

" There would, however, be this difference. In all our States, the authorities are chosen or appointed by the people or authorities thereof. The United States Government has no part in their election or appointment. In Brazil, however, the governors of the Provinces being appointed by the Imperial Government, the latter may be regarded as specially responsible for their acts in all cases where the law of nations may have been infringed and justice may be unattainable through the courts." (Moore, International Law Digest, Vol. VI, pp. 815–816.)

The weakness of such an argument is apparent; and yet the United States has adhered to a policy which could only find a foundation on such sophistry and on such slender logic as Mr. Fish here employs.

dent's recommendation was debated in Congress, there was by no means unanimity in support of the doctrine of Federal nonliability which had been advanced by Secretary Bayard. Mr. Edmunds, in discussing the question before the Senate, declared as a general principle of international law binding on all states, whatever their system of government, that —

> One nation as between itself and another is not bound by the internal anatomy of that state, but it looks to the body of the nation to carry out its obligations, and if they have not the judicial means to do it, for one reason or another, the nation that is injured is not bound by the failure of the nation whose people committed the injury.[12]

The United States, had it been willing to follow the rule thus clearly stated, would have been consistent with its attitude in pressing claims of American citizens domiciled in foreign lands; but we find the Secretary of State, in transmitting to the Chinese minister the moneys voted by Congress, again denying the responsibility of the Federal Government for the negligence of the territorial police and courts.

Six years after the Rock Springs riot New Orleans witnessed a similar outrage, the victims being Italians. The chief of police of that city having been assassinated, popular belief fixed the blame upon the members of a secret society called "La Mafia." Eleven Italians were arrested on suspicion. So high ran public feeling that an armed mob broke into the city prison and shot the prisoners to death. Baron Fava, the Italian minister, at once demanded of the Government at Washington that the guilty parties be "speedily brought to justice." Secretary Blaine telegraphed the governor of Louisiana that the President hoped that the governor would cooperate with him in maintaining the obligation of the United States to Italian subjects and that the offenders would be punished without delay.

The Italian minister, informed of this action, was not satisfied, but demanded a specific assurance from the Federal Government that the rioters would be brought to trial, and that a direct admission would be made by the United States that an indemnity was due to the

[12] Cong. Record, vol. 17, p. 5186.

relatives of the victims. To this demand Mr. Blaine made an adroit answer, which, though it admitted nothing in fact, was of such a character that the Italian Government interpreted it to be a compliance with the demand.[13] This reply was made in April, 1891. In less than a month the grand jury at New Orleans charged with investigating the crime made its report, in which they failed to indict any person for the lynching.

This failure on the part of the Louisiana authorities to apprehend the perpetrators of a crime committed openly and with no attempt at secrecy placed the Federal Government in a very embarrassing position in view of the interpretation which had been placed on Mr. Blaine's note. President Harrison, in his annual message of 1891, evinced much chagrin at the outcome of the judicial proceedings, and recognized the inconsistency of the position in which it placed the United States. After deploring the lawless act of the New Orleans mob and the failure to punish the persons who shared in it, the President sought to find a solution for the difficulty in which the Central Government was placed by the division of authority between State and nation under the existing practice. To that end he made the following suggestion to Congress:

> It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal courts. This has, however, not been done, and the Federal officers and courts have no power in such cases to intervene either for the protection of a foreigner or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in consideration of international questions growing out of such incidents, be regarded in such sense as Federal agents as to make this Government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights.[14]

The force of this logic as to the responsibility of the United States for the acts of local authorities seems irresistible; but as to the power

[13] Foreign Relations, 1891, pp. 665–713.
[14] Foreign Relations, 1892, p. xiv.

of Congress to define crimes against treaty rights, a question may be raised as to what rights can be granted by treaty other than those which find their origin in the accepted rules of international law. It involves that fertile subject of discussion, the extent and limitation of the treaty power, which can not here be considered. But as to alien rights established by international law no question can be raised, for the Federal Constitution provides that Congress can legislate for the punishment of offenses against the law of nations.[15]

The effect of this declaration by President Harrison as to the responsibility of the United States and the unexercised powers which the Federal Government possessed in regard to domiciled aliens was twofold. First, Secretary Blaine, in delivering to the Italian minister a sum of money for the families of the victims of the New Orleans mob, stated that the President felt that it was "the solemn duty, as well as the great pleasure, of the National Government to pay a satisfactory indemnity." Here is no reservation as to the Government's obligation, but an unequivocal admission of liability. Second, a bill was the same session introduced in the Senate which provided that any act committed against the rights secured to an alien by treaty, which constituted a crime under the laws of any State or Territory, should constitute a like crime against the United States and be cognizable in the Federal courts. The bill was reported favorably and debated at some length, but failed to become a law. Thus, the efforts of President Harrison to change the policy of the United States, which had so long invited the complaints of foreign governments and taxed the ingenuity of American statesmen, came to naught.

Other lynchings of Italians occurred during the Administration of President Cleveland, and, after special investigations had been made by the Department of State, the Federal Government paid certain sums for "indemnity," although there was a return to the old practice, for the payments were made without "discussing the liability of the United States for these results [of lawlessness], either by reason of treaty obligations or under the general rules of international law."

Further outrages of a similar nature having taken place during

[15] Constitution, Article I, section 8, clause 10.

the next Administration, President McKinley, in his annual message of 1899, quoted the language of President Harrison and urged legislation along the lines of the bill of 1892.[16] Congress, however, failed to take any action. In his annual message of 1900 the President again renewed "the urgent recommendations" which he had made the year before. The enactment of such a statute, he says, "is a simple measure of previsory justice toward the nations with which we as a sovereign equal make treaties requiring reciprocal observance."[17] Still the President's appeal was without result. Congress evidently hesitated to enact a law which seemed to infringe upon the exclusive criminal jurisdiction of the State courts, and to adopt a course which might be interpreted as a usurpation of authority by the Federal Government.

Seven months after President McKinley's message of 1900, a mob in the State of Mississippi killed several Italians. The ambassador of Italy made complaint in vigorous language, and, after an investigation of the case, Congress in March, 1903, appropriated $5,000 for the claimants "out of humane consideration, without reference to the question of liability therefor to the Italian Government."[18] Thus, the United States, through the legislative branch of the Government, returned to the doctrine of former years, ignoring the declarations of Presidents Harrison and McKinley. But, considering the fact that no laws had been enacted by which the Federal courts were given jurisdiction of such cases, the position taken by Congress was natural. The fault lay in the failure to legislate as to crimes against aliens rather than in a denial of responsibility therefor.

Thus the question stands to-day. The United States has persistently held foreign governments liable in damages for wrongs done to American citizens when public authorities have willfully or negligently failed to protect them in their rights and to punish persons violating them, whether such rights are based on treaty stipulations or the general rules of international law. On the other hand, up to 1891, the United States has with equal persistency denied responsi-

[16] Foreign Relations, 1899, p. xxii.
[17] *Ibid.*, 1900, p. xxii.
[18] 33 Statutes at Large, p. 1032.

bility and liability for the failure of local officers to perform their duty toward aliens domiciled in the United States on the ground that under the Constitution the Federal Government has no authority over the police and judiciary of a State, and that these were charged with the protection of individuals and the punishment of crimes. After President Harrison's declaration as to the responsibility of the United States for the acts of State authorities, there is a noticeable change, in that the payments made for wrongs to aliens are termed "indemnities" and are not treated as merely charitable donations. And yet the Government has persisted in declaring that such payments must not be regarded as an acknowledgment of liability. In a word, the United States, when not the aggrieved party, clings still to a doctrine out of all harmony with the recognized practice of nations, a practice which it has uniformly required other nations to observe.

It is not the purpose here to discuss the constitutionality of the remedial legislation proposed by President Harrison and urged by President McKinley. That it was proposed by so distinguished a jurist is a strong argument in its favor. On the other hand, the arguments advanced by the opponents of the bill, that the laws against crimes would not, under its provisions, be uniform throughout the Union, but would vary with the penal codes of the different States and Territories, and that to punish acts against foreigners Congress must define the crime and fix the penalty,[19] are not without force in determining the constitutionality of such legislation. That it would, if enacted, give a measure of relief in cases involving criminal acts seems probable, but to what extent it would do so is a question that can be answered only after such a law has been put in operation.

There are, however, many other acts, particularly those of a public character, which are not criminal in their nature, that infringe upon the rights of aliens secured by treaty. A State statute or a municipal ordinance or regulation may be in contravention of such rights. How can these local legislative violations be prevented, so that foreign governments will not have just grounds for complaint? It is apparent that the problem presented is a complex one, and its

[19] Cong. Record, vol. 23, part 5, p. 4551.

solution difficult. But it must ultimately be solved; for, if it is the duty of the Federal Government to protect foreigners in their rights, there must be some constitutional method by which it can perform this duty.

The rights of individuals in a foreign land are far more extensive and definite than they were fifty years ago; and international obligations and liabilities are more fully comprehended and more universally acknowledged than they were then. A nation can no longer live within itself. It can not ignore the generally accepted principles of international law, nor can it afford to defy the opinion of the civilized world by refusing to comply with them. Whatever political institution or political system a nation may possess for the government of its domestic affairs, such institution or system must not interfere with its international duties. No state, however powerful and enlightened it may be, can claim a place among the great nations which is not prepared to do as well as to demand "natural justice" in the broad sense which that term has acquired at the present time. The policy of national selfishness has become antiquated and must give place to those altruistic ideas which are consistent with the modern conception of international morality.

Justice and expediency alike require the United States to abandon a policy which is inconsistent and unreasonable, to recognize fully its responsibility for the proper protection of foreigners within its borders, and to put in operation the necessary forces to compel public officers and local governments, as well as private individuals, to respect the rights which the Federal Government has granted by its treaties to the subjects and citizens of foreign states, and the rights which belong to them under the accepted rules of international law. When that is done, the United States will be free from a policy that has caused its Government much perplexity and embarrassment in the past, and is out of harmony with the modern practice of civilized nations.

The CHAIRMAN (Mr. Foster). Before the subject is opened to general discussion I would like to make one or two announcements. The meeting for this afternoon will be for the discussion of the topic

"How far should loans raised in neutral nations for the use of belligerents be considered a violation of neutrality?" Secretary Straus, one of the Vice-Presidents, will preside at the afternoon session. Professor Reinsch, of the University of Wisconsin, will present the leading paper in the discussion of the subject. The session to-night will be the discussion of a paper presented by General Horace Porter of the Hague Conference. As we all know, General Porter was one of the prominent and influential members of that conference, and the occasion will be an interesting one and will be open to the public. So you will please make it known to your friends that this is a public meeting to-night. Mr. Smith, of Montreal, will also be heard to-night on the subject of arbitration. There will now be a short time for the discussion of the paper just read, but the remarks will be necessarily brief.

Mr. James O. Crosby, of Garnavillo, Iowa. Mr. President: In the first paper read there was a suggestion made that might be barren of results — that authority should be given the Federal court to investigate the same question. Would not that be in violation of the provision that no person shall be twice put in jeopardy of life and liberty, and would it not be avoided by making the jurisdiction of the Federal court not original but appellate? It seems to me the same objection would not exist.

Mr. Everett P. Wheeler, of New York City. Mr. President: The reply to that is this: It has come to pass in our complex system that the laws of the United States punish counterfeiting, and the laws of the States punish the passing of counterfeit money, and it has been held that it is competent for each jurisdiction to prescribe the punishment for those offenses which in effect amount to the same thing, so far as the actual conduct and guilt of the individual are concerned. So in this matter, Congress has under the Constitution power to punish offenses against international law and it has certainly power to enforce by legislation the provisions of treaties. That is not at all inconsistent with a State also undertaking to punish offenses against its own peace. In the one case it is an offense against the State that is punished, and in the other it is an offense against the nation. But

I think we may say that it is rather a theoretical than practical objection, because it is inconceivable that both departments of our great complex government should intervene at once. If the Federal district attorney, for example, should present the matter to a United States grand jury and an indictment should be found, that undoubtedly would take preference. So, in like manner, if the individual be indicted under the State law and should be put on trial in that court, that jurisdiction would take preference. In our admiralty law it has often happened that a sheriff has process against a vessel by attachment under the State law and a United States marshal has process issuing out of the Federal court in admiralty, and yet, by comity, it has been recognized by the courts that whichever jurisdiction first gets possession of the property which is the subject of dispute shall hold and maintain it. There has been no actual conflict except, unless I am mistaken in my recollection, during the heated passions which prevailed before the war on the subject of slavery, and particularly in reference to the fugitive-slave law. There was an instance in Wisconsin where there came an actual conflict between the State and Federal authorities. If my memory serves me, that is the only instance in the history of the country where the conflict has come to the point of actual physical dispute. But that has passed away with the passions which gave rise to it, and it can hardly be imagined that under our present conditions such an actual conflict could arise. But however that may be, the law is that there may be in the same act a violation of Federal obligation and a violation of State obligation. Each jurisdiction has the lawful authority to punish that offense, and the punishment of that offense is not in any respect putting a person in jeopardy twice for the same act, because in the eye of the law it is not the same act. One is an offense against the United States and the other an offense against the State.

Mr. Edmund F. Trabue, of Louisville, Ky. Mr. Chairman and Gentlemen: It seems a little strange that we should be, at this date, seriously discussing whether or not we have power, and ought, to enact legislation necessary to carry out our treaty obligations.

Now, the objection urged to the exercise of power seems to be that the rights of the States will be infringed. The best States' rights

men are those who fully recognize the power which is justly due under the Constitution to the Federal Government, and the best nationalists those who fully accord to the States the powers justly belonging to them.

It is true, as suggested by Judge Gray, that a foreigner has no greater rights in any country than a citizen of that country, but we recognize the rights of the Federal Government in the States, and a citizen of one State is not dependent upon the local judiciary of another State, perhaps prejudiced and partial in controversies between him and local citizens, but is entitled to resort to the Federal courts.

Again, the Federal Government has the right of self-protection in the States, and did not rely upon California to protect Justice Field from the deadly weapon of an ex-justice of its highest court, but assigned him Federal protection, and its act was upheld in *Ex parte* Nagel.

When treaties and the Federal Constitution and statutes are the supreme law of the land, the Federal Government is not dependent upon the caprice of the States for enforcement of its treaties, and if it were it would be timid indeed in making treaties, and the States emboldened in capriciously disregarding them. It is not depreciating the States to recognize the just powers of the Federal Government, and it would humiliate the Government to have to rely upon the States to fulfill its treaties. Recompensing foreigners for injuries to person and property, coupled with the protestation that the act is one of bounty or generosity and not of duty, confesses the duty and concedes its nonfulfillment.

Mr. Frederic R. Coudert, of New York City. Mr. Chairman: The approach of the lunch hour, the heat of this spring day, as well as your firm but tender warning, are more than sufficient to prevent my launching upon anything that may be construed into a prolonged discussion or rise to the dignity of anything more than a passing, but I trust not wholly irrelevant, interruption of the course of this learned and orderly debate.

None of the learned gentlemen who have advocated the right of Congress to pass legislation necessary to enforce treaties have con-

vinced me that they were wrong. I am still, as I was before I had the pleasure of hearing them, entirely in agreement with their view that the United States Government has full and plenary power to carry out all the obligations which it may properly subject itself to by its treaties. Upon hearing so much interesting discussion upon what seemed to me so fundamental a point, I could not help being reminded of the old-fashioned and religious gentleman who, stopping at a bookstall, picked up a volume which purported to prove the existence of God. As he looked at the title, he remarked: "As though anybody would have been fool enough to doubt it, if some wise man had not written a book to prove it."

If the learned Chairman please, it has just occurred to me to refer to an example of how a treaty stipulation may be and actually is enforced.

Some time ago, the Russian consul-general in New York informed me that the local court of Massachusetts had refused to allow the Russian vice-consul to take out letters of administration upon the estate of a Russian national dying intestate in Massachusetts. The amount left by the Russian was insignificant but not so insignificant as to escape the eye of the public administrator, who claimed that under the Massachusetts code it was his right to administer all the estates of decedents leaving no resident or citizen heirs competent to take out letters. The Russian vice-consul, alive to the dignity of his office, consulted counsel, as to whose competency modesty forbids me to speak, and he was advised that under the most-favored-nation clause of the treaty he had the right to claim appointment as administrator, and that in that respect the local laws of Massachusetts were superseded by the treaty.

This contention was based upon the fact that in some of the treaties with the Latin-American states there is a clause permitting the consuls of each nation to administer in the case of one of their nationals dying intestate and with no citizen relatives competent to administer under the local law.

When this suggestion was made to the probate court in Massachusetts, it was somewhat contemptuously dismissed with the suggestion that no mere treaty could supersede the procedural dispositions of the

law of the Commonwealth of Massachusetts, especially in view of the fact that no United States statute sanctioning the treaty clause in question could be found.

After this rebuff, nothing was left but to appeal to the Supreme Court of Massachusetts, and that court, after respectfully listening to extended argument upon the whole subject, delivered a characteristically learned and I believe sound opinion to the effect that the treaty clause was part of the "law of the land," including Massachusetts itself, and that it *pro tanto* superseded and overrode those otherwise obligatory dispositions permitting the public administrator to take into his hands all property so situated.

The right of the consul was thus held superior to that of the public administrator and the treaty clause part of the law of Massachusetts, although no Federal legislation other than the treaty itself existed on the subject.

As the amount was very small and the matter of little practical importance, the case attracted no attention. The consul did not attempt to advertise it and it did not come into public notice, except that the decision was published by my learned friend the editor of the INTERNATIONAL LAW JOURNAL, from whose scrutinizing vigilance nothing bearing upon international law can possibly escape.

Does it not seem almost ludicrous that matters so comparatively insignificant as the administration of the small estates of alien immigrants can be placed by treaty stipulations under the solemn protection of the Federal Government, and yet guaranties of life, liberty, and security given to foreigners under treaties may be set at naught in the Commonwealth of the Union? (Wymans, Petitioner, 191 Mass., 276.)

It seems to me unsound and scarcely plausible to argue that the enforcement of such treaty stipulations can interfere with the law of the States. All the States have laws which provide for the security of life and property. It is not a new law that is needed, but a better enforcement of existing law. The Federal tribunals, in carrying out such treaty stipulation, would consequently be merely enforcing the local law, just as they do to-day in cases arising between citizens of the various States.

There is, therefore, nothing new or revolutionary in the suggestion

of transferring to the Federal court certain criminal cases arising between foreigners and persons in the States. The State's sovereignty is no more detracted from than in the every-day case of trying the question of whether a citizen of New Jersey, injured by a New York trolley line, should have redress.

If one prefers to sue in the Federal court, it has been frequently held that the motive dictating such action is not a matter that will be inquired into. If the machinery of the State courts is not always adequate to protect foreigners in those fundamental rights which are guaranteed to all men by the Constitution, why should the State complain if the United States chooses to make a treaty guaranteeing those very same rights and allowing those guaranties to be enforced in the Federal courts?

The matter seems to be one wholly of the detail of the procedure rather than one involving any large question of policy or constitutional law.

Mr. GEORGE TURNER. Mr. Chairman: When I was preparing my paper and had approached that part of it relating to the character of penal legislation which I thought might be adopted eventually, I endeavored to reduce to concrete form some of the abstractions that I was talking about, and I reviewed two forms of statutes, according to the alternative suggestions expressed by me, in order to see if I could reduce to concrete what I had suggested. I have that in my hands now, and as it bears somewhat upon the discussion that has been had here, I will ask, if consistent with the rules of the Society, that it be published along with my former statement.

The CHAIRMAN (Mr. Foster). That will be done, without objection.

[There was no objection.] [20]

The CHAIRMAN (Mr. Foster). There are many of us here who have borne the heat and burden of the day on these questions, and it is a pleasure to know that the young men are coming forward. It is gratifying to me to hear Mr. Coudert, who represents a worthy name for very distinguished service in the practice of international law, speak to us this morning. There are a few minutes now before we

[20] See p. 34, *supra*.

take our midday adjournment. Is there anyone else who desires to be heard?

Mr. LAWRENCE EVANS, of Tufts College, Mass. Mr. Chairman: I would like to add just one word to this discussion. In almost every case where the rights of a foreigner are invaded in this country the one form of redress which the government of the injured national demands is the one form which this Government can not afford — that is, the guaranty that the offender will be sought out and punished. It is an easy thing for the Government of the United States to pay an indemnity, and particularly easy for it to do so when it is at the same time disclaiming all obligation to do so, but in a large proportion of the cases the one thing which the government of the injured national demands above everything else is the detection and punishment of the offender. Of course our Government could not under any circumstances guarantee the conviction and punishment of the guilty parties; but if the suggested change in the law were made the Government could guarantee that it would use its utmost efforts to obtain such conviction and punishment by a prosecution conducted by its own officers in its own courts. Now, we know, in the case of the Italians who were lynched at New Orleans in 1891, in what a humiliating position the Department of State of the United States was placed when it was obliged to confess to the Government of Italy that the prosecution and punishment of the offenders rested altogether with the State of Louisiana. We also know how that feeling of humiliation must have grown in view of the failure of the State of Louisiana to make any adequate attempt to ascertain who the offenders were. There, it seems to me, is the chief reason for the enactment of legislation which will extend Federal jurisdiction to offenses of this kind, in order that our Government may be relieved from this very embarrassing position which it is forced now to occupy when we must confess to every foreign government that if their citizens are injured here we can not undertake to seek out the guilty parties and prosecute them in the Federal courts.

The CHAIRMAN (Mr. Foster). The hour has arrived for the adjournment of the morning session.

Our meeting this afternoon will be at half-past three o'clock, but members who are to be received by the President should be here at two o'clock and go to the White House in a body.

[At this point the meeting took a recess until 3.30 o'clock p. m.]

RECEPTION BY THE PRESIDENT OF THE UNITED STATES

Friday, April 24, 1908

At half-past 2 in the afternoon the President of the United States, attended by Hon. Elihu Root, Secretary of State, and Hon. William H. Taft, Secretary of War, received the members of the American Society of International Law in the East Room of the White House.

AFTERNOON SESSION

Friday, April 24, 1908

The Society reassembled at 3.30 o'clock p. m., pursuant to adjournment, the Hon. Oscar S. Straus, Secretary of Commerce and Labor, in the chair.

ADDRESS OF MR. OSCAR S. STRAUS, OF WASHINGTON, D. C.

Gentlemen: The subject for this afternoon, as you will observe from the program, is "How far should loans raised in neutral nations for the use of belligerents be considered a violation of neutrality?"

The subject of loans in time of war is one that I had occasion to bring forward at the last meeting, and on several occasions before and since then in connection with the peace conferences that have been held throughout the country. It has always appeared to me as an inconsistency, in view of the development of the materials of warfare in modern times, that neutral nations, which are inhibited by the principles of international law from supplying war vessels and the muniments of war to belligerents, are not inhibited from supplying money. A few generations ago the effective instruments of war were entirely personal — that is to say, the soldier who was maintained by the liege lord, and was ready for fighting at all times, subject to the command of his over-lord, to whom he looked for protection, and there was very little use, in the larger sense, for money.

The principles of international law, which were so learnedly outlined this morning by the President of the Society, are derived from precedents that come down to us from conditions of society that are entirely different from those under which we live. These principles have been derived or largely developed, not from international right and justice, but from might and expediency — an expediency that grew out of power, as distinguished from international equity and justice. In other words, the development of international law is

entirely different from the development of municipal law, which has its basis in the equality of the individual before the law.

Many of the so-called principles of international law that have come down to us are not principles at all. They are the fine-spun arguments that legal casuistry has devised to justify and obscure the aggressions that powerful nations have made in defiance of the rights of the weaker. As that law stands at present, developed by the casuistry to which I have referred, the principles of neutral rights and neutral duties derived therefrom are not in consonance but in direct conflict with the enlightened conscience of nations.

We are making progress in substituting principles of right for expediency in the relations of nations, and international law will have to shape itself in accordance with this new spirit which international conscience demands. It is quite well established that in time of war neutral nations, as such, are inhibited from lending money to belligerents, but the subjects of neutral nations, their bankers, can lend and do lend money, and not only loan it, but in order to raise it advertise public loans for the purpose of advancing money to belligerents. This was done in the last war between Russia and Japan. Large Japanese loans were negotiated and obtained publicly in this country and in Great Britain, and Russian loans were advertised and obtained in France and in Germany. Now, everyone knows that money advanced to belligerents signifies the giving to them of means for securing war instruments. Money is the most effective war instrument. It is simply sophistication to hold that a neutral can not loan money to a belligerent without performing an unneutral act and yet permit the subjects of neutral nations to do this. It is in essence a contradiction of international honesty that such should be permitted, yet the international authorities are practically agreed upon such a discrimination. It is a technical but not an honest discrimination. It is not founded upon sincerity. The same may be said in regard to a great many of the principles of international law, and the reason is, they were not derived from either honesty or justice, but purely from might and expediency.

The doctrine of neutral rights is largely predicated upon the protection of commerce, while the principle of neutral duties has been

largely ignored, and yet for the purpose of maintaining international peace neutral duties are far more important than neutral rights.

If the purpose of international law is to safeguard international justice, then those acts which are inhibited as to neutral nations should be equally inhibited as to the citizens or subjects of such neutral nations. To hold a different view must be predicated either upon technicality or upon the theory that such a neutral nation has not the power or ability to control its subjects or citizens, and we know this latter predicate is not true. Every civilized nation has that power, and if it has the power it should be made to exercise it. I know I am not expounding international law as presented by the text writers. My purpose is to point out the principle upon which the international law upon this subject must develop in consonance with the principles of international justice. We of the present day know what neutrality based upon principle means and should be, and it requires only an application of the ordinary sense of right and justice to international relations to make that principle effective.

National boundaries in the sense of national exclusiveness are falling away in our age, due to the rapidity of intercommunication, and to the facility with which people go out from one country and enter another, or, in other words, to the movement of population, to immigration, and to emigration. Last year we received in this country nearly a million and a quarter immigrants who came to us from foreign shores, and about a half that number during the same period have left our country to return to their former homes. Nations are coming nearer and nearer together. We speak of the family of nations. Several generations ago this phrase might have been regarded as a euphemism, but in our day this is truly so — we are a family of nations, and the family ties are made closer and closer by the movement to and fro of population. Our missionary societies spend millions in sending missionaries to foreign countries in order to spread the ideals of American Christianity in Oriental lands. This vast number of immigrants and emigrants to and from our country and other countries are in the very nature of things voluntary missionaries who carry the best in the civilization of their respective nations from one country to the other. They do more than

this; they stimulate international trade, and promote international relations. This movement of population was made possible to a considerable degree by reason of the doctrine of expatriation as distinguished from perpetual allegiance, which our Government from its very beginning has steadfastly upheld and insisted upon, so that with very few exceptions it is accepted by the leading nations of the world. The result has been, and will be more and more, to facilitate intercommunication, and to necessitate a revision not only of neutral rights and of neutral duties, but of many of the principles of international law as affecting the relations of nations.

Some phases of this general subject have been already brought forward in the former and in the recent Hague Conference, and I trust when the next conference assembles the subject of neutral rights and duties will receive direct attention and will be reexamined with the view of bringing them in consonance with the growing spirit of international right and justice, which is making such rapid advances among the enlightened people of the various nations of the world, due in no small degree to the peace movement, and to societies such as this, devoted to the elucidation and study of the law of nations.

I now have the pleasure of introducing to this audience Prof. Paul S. Reinsch, of the University of Wisconsin.

ADDRESS OF MR. PAUL S. REINSCH,
OF MADISON, WIS.

Mr. Chairman, Ladies, and Gentlemen: It is the privilege of students of international law to devote their attention not only to an analytical study of practices and rules already in full operation and force, but also to those principles which, through their intimate connection with the growing interests of our common humanity, promise to acquire increasing authority in the future. Thus, we not only consider the rigid and stern precedent of legal action, but also the promise of a day when humanity will cast its laws in still nobler forms and will adjust them to a broader view of life. As international law rests in the last analysis on a strong and enlightened public opinion, the publicist dealing with that science should not

neglect the powerful currents of ethical feeling which manifest themselves among the populations of civilized states. He should consider the inevitable tendencies of public opinion on these matters, as well as the broader connection of legal rules with advancing civilization. In the field of international law, the idea of Kant is realized; every man becomes a king and legislator, and every man, in turn, should realize that upon his rational and responsible sense of justice international law is founded. It is for this reason perhaps that the committee has selected a subject like the present one, which thus far belongs rather to the field of international ethics than to that of positive international law. But we must not suppose that a direct scientific interest is lacking in a subject of this nature. Who would praise the physicist for confining his attention to the laws already ascertained, and for treating the direct conversion of energy in coal, or the problem of aërial navigation, as fit only for fantastic and trifling minds. Even so it would be short-sighted to consign to a platonic Utopia problems like the present one, though their definite solution may lie in the distant future.

The question of war loans raised in neutral countries has been given some prominence on account of the practices during the Russo-Japanese war. The manner in which both combatants were dependent upon the credit of institutions in neutral countries made plain to all beholders the direct relation between external financial support and war power. As a result it has been urged in many quarters that the raising of war loans in neutral countries should be interdicted in the interests of general peace.

In his memorial prepared before the Second Hague Conference convened, Sir Thomas Barclay included a section to the following effect:

> The duties of a neutral state are (*d*) to forbid the raising within its jurisdiction of loans by public subscription for the benefit of either belligerent.

The fifteenth as well as the sixteenth International Peace Congresses (the latter in Munich, 1906) passed resolutions in a similar sense. All this gives the question a certain actuality at the present time.

The recent development of international law points in general toward a stricter interpretation of the duties of neutrals in time of war. In this matter, as is well known, the greatest individual advances are due to the policy of the United States, especially in connection with foreign enlistment and the equipment of men-of-war. It is true, the general principle of neutral responsibility may still be stated in the following language (used by the International Law Institute in 1875):

> The mere fact of a hostile act being committed on its territory is not sufficient to render a neutral state responsible, but it must be shown that there existed either a hostile intention [*dolus*], or manifest negligence [*culpa*].

Yet we have developed stricter ideas both as to what constitutes a hostile act and what degree of diligence is required on the part of a neutral state. The general point of view at present is that the struggle of war should be restricted as far as possible to the combatants, and that there should be no sort of subsidy or maintenance on the part of outsiders. As was the case in the olden times of the common law, maintenance and champerty usually go together. The nation that assists a belligerent hopes itself to profit thereby politically. And neither action is in the interest of the world community, because the justice of the cause may thus be overshadowed by mere economic influence.

Turning, now, to our present problem we may take as our perspective the question whether war loans are a hostile act on the part of a neutral state, and whether as a matter of fact such operations could be prevented by due diligence on the part of the neutral government. No argument is required to show that war loans constitute a most potent assistance to a belligerent power. Relying totally upon its own ready resources, many a belligerent would have hesitated to venture upon the fortunes of war. In other cases, again, the cessation of hostilities has been clearly traceable to the exhaustion or closure of foreign sources of money supplies. In the eyes of many authorities this fact has been sufficient to condemn the use of neutral markets for war loans as an act not in harmony with the principles of neutrality. War, if justifiable at all, ought to be a fair test of

national strength. Whatever moral character as a furnace of righteousness it may have, is destroyed when either or both belligerents are sustained by financial support from without. The sense of fairness is outraged when we see such support given by countries which under a juster system would be bound to maintain an attitude of substantial impartiality. The practice, moreover, makes it possible for a rich nation virtually to engage an international mercenary to fight its battles. Itself maintaining a correct attitude of strict neutrality, it may nevertheless have its own interests defended by some other nation to whom it furnishes the sinews of war. That a nation should thus be able to cause war by its financial policy, but should at the same time escape all responsibility and all the direct burdens of suffering incident to such calamity, may in the future prove a serious menace to the peace of the world. The possibilities for diplomatic finesse thus presented, the danger of having human lives and the somber issues of peace and war dealt with in the spirit of financial calculation, are not entirely vain imaginings.

We may also note certain incidental consequences of the growing importance of war financeering. It fosters the betting or gambling instincts on a vast scale and introduces an element of recklessness into state finance that should be alien to such serious interests. It encourages a combatant to take unwarranted risks in the hope that having once committed the money market of a certain nation to its side, it may count on almost unlimited support, on the principle that a new investment will be called for to make the old one good. The temptation to intrigue and misrepresentation opened up by such a condition is appalling. Let it once be fully realized that the outcome of a war depends not entirely upon the conduct of troops on the field of battle, but to a large extent upon the impression made upon the French, British, or American investor, the neutral money market will be fought over with all the intrigue and corruption that only a grave national crisis can impel. No means will be shunned to gain control of the press and to influence important financial agencies. The full possibilities of such machinations only a great future war will reveal; though we have already had a taste of attempts artificially to mold public opinion in conflicts of recents years.

Considerations such as these have influenced the opinion of many publicists, who have condemned the practice of raising war loans in neutral countries. Bluntschli, Phillimore, and Calvo emphasize the thought that such loans are similar to direct subsidies or to the levy of auxiliaries, and therefore fall under the general principle prohibiting unfriendly acts. Kent makes the categorical statement that a loan of money to one of the belligerent parties is considered a violation of neutrality. Bluntschli and Calvo distinguish between loans publicly advertised and subscribed, which they consider inadmissible, and individual subscriptions of private citizens, for which the neutral government should not be held responsible under its duty toward belligerents. Bluntschli follows out the analogy to a levy of troops by stating that individual volunteer service or individual loans are permissible and that government responsibility covers only public levies of troops and public subscriptions of money. This analogy had already been pointed out by Vattel. Pillet and M. Kleen follow these authorities in the principle that public emission and advertisement of a war loan should not be allowed by a neutral power. Strangely, the latter writer would permit loans of a commercial nature, based on considerations of credit and interest alone, even when made directly by the neutral state to a belligerent. This thought, which is found also in other writers who are in general opposed to neutral war loans, robs his general principle of practical value, as it would evidently be an easy matter to give any war loan the appearance of a commercial transaction.

While Bluntschli and Calvo dwell on the analogy of war loans to acts recognized as hostile in their nature, later writers, like M. Kleen and Politis, strive to show in what manner the government of a neutral state may actually be said to be itself responsible for war loans emitted in its territory. Kleen emphasizes the fact that it is the protection of the laws of a neutral state which afford belligerents an opportunity to acquire in full security the sinews of war; implying that such protection should not be accorded. Politis, too, states that it is the authority of the neutral governments which directly or indirectly protects all loans emitted. He holds that the advantage of using a national money market is rarely, if ever, *de facto* equal to

both belligerents. By opening the market at all, the neutral government therefore almost invariably favors one, at the expense of the other, belligerent. Politis also dwells on the importance of public advertising of loans in a neutral country, as attracting the ordinary investor, who would rarely send his money abroad to some foreign credit institution or agency. The case for government responsibility seems to him especially clear in countries where the listing of bonds on the exchange requires an official sanction, as is the case in Austria-Hungary, Russia, Spain, Portugal, and Turkey. In France, since 1880, the privilege of listing is granted by the Chambres Syndicales; but the Minister of Finance may disallow such listing and circulation of bonds. Westlake, who in general does not admit the responsibility of neutral governments in this matter, holds that "if by the law of a neutral state the consent of the executive is required to loans by individuals to foreign powers, or if the executive is in the habit of controlling such operations, a loan by individuals to a belligerent which is allowed to slip through the meshes will have an international character. But in a country where the loan market is free, such loans are as legitimate as ordinary commercial undertakings."

The attempt of Politis to connect the state specifically with responsibility for the issuance of loans is to my mind open to the objection that other pursuits, such as the manufacture of arms, could also not go on without the police protection of the state, and yet we do not hold the government responsible, as delinquent in its neutral duties, for permitting such manufacture and exportation. Nor could the fact that the laws of Austria-Hungary, for instance, require the governmental sanction for the listing of bonds be justly made a ground for holding that state responsible for permitting loans which may freely be raised in other neutral countries, provided, of course, that it shows no partiality to either of the contestants. For it would seem unjust that such a difference in municipal law should be allowed to affect unfavorably the international responsibilities of a given country.

A more fundamental and far-reaching principle than we have yet reviewed is that stated by Bulmerincq. It is to the effect that the subjects of a neutral state must make their actions during a war

conform entirely to the neutrality of their government. This principle has, in its essence, also been made the basis of the decision in the Supreme Court of the United States in the famous case of Kenneth v. Chambers, 14 Howard, 38 (1852). The case arose upon a contract between private parties, in which it was agreed to convey property in Texas in return for certain payments of money, and which contained the recital that the party of the second part was desirous of assisting General Chambers, the party of the first part, in raising, arming, and equipping volunteers for Texas, and of advancing the cause of freedom and independence of that State. The contract was made at a time when Texas was in rebellion against the Mexican Government and before its independence had been recognized by the United States. The Supreme Court held the contract illegal and void. Chief Justice Taney developed the basis of the decision in the following striking language:

> The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the Government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the Government is in amity and friendship. This principle is universally acknowledged by the law of nations. It lies at the foundation of all governments, as there could be no social order or peaceful relations between the citizens of different countries without it. It is, however, more emphatically true in relation to citizens of the United States. For as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereignty may pass, or the treaties into which they may enter, within the scope of their delegated authority. And when that authority has plighted its faith to another nation that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged. The compact is made by the department of the Government upon which he himself has agreed to confer the power. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement, to promote or encourage revolt or hostilities against the territories of a country with which our Govern-

ment is pledged by treaty to be at peace, without a breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. And if he does so he can not claim the aid of a court of justice to enforce it. The appellants say, in their contract, that they were induced to advance the money by the desire to promote the cause of freedom. But our own freedom can not be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the Government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

A similar state of facts was involved in the English case of DeWutz v. Hendricks, 9 Moore, 586 (C. P. 1824). In his decision, Lord Chief Justice Best (later Lord Wynford) said, by way of *obiter dictum:*

I then thought that it was contrary to the law of nations for persons residing in this country to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign state in arms against a government in alliance with our own; and that no right of action could arise out of such a transaction. * * * A case in circumstances precisely similar to the present, except that a different loan was proposed to be raised, was lately decided in the Court of Chancery in which the Lord Chancellor entertained the same opinion as myself, and in which he is stated to have said that English courts of justice will not take notice of, or afford any assistance to, persons who set about raising loans for subjects of the King of Spain to enable them to prosecute a war against that sovereign; or, at all events, that such loans could not be raised without the license of the Crown.

These cases involving the identification of the citizen's action and responsibility with that of the state are indeed of the greatest importance in the theory and practice of international law. The decision of Kenneth v. Chambers is especially noteworthy for its elevated conception of private duty in international matters. It is true to the high demands which the republican form of government makes upon its citizens, and it foreshadows the era when the people of republican states will be fully permeated with a sense of their international responsibilities. But it must be noted that as legal precedents these cases relate merely to loans in favor of insurgent or

rebellious governments. As has been pointed out by Westlake, the question of neutral duties is entirely foreign to such loans to insurgents. In such cases there is only one friendly power involved — the government against which the insurrection is operating. Moreover, the loans to insurgents can hardly be looked upon as regular and normal financial operations — the risk involved placing them *ab initio* in a class by themselves, as thoroughly speculative and presumably unsound ventures. In such cases the courts deal, of course, only with the status of the parties before them. They look upon their contracts as vitiated by the immoral character of the consideration, and refuse to lend their assistance in enforcing them. The action of the courts does not refer to any contingent responsibility of the neutral state itself, in damages, for the acts of individuals. A later English case (*ex parte* Chavasse *re* Gazebrook, 34 L. J., Bankruptcy Cases, 17) distinctly decides that "acts of individuals independent of, or unknown to, their government can not, in matters of loans, any more than in sales of munitions of war, be considered violations of neutrality."

Turning, now, to the opinions in opposition to the principle of holding a neutral state responsible for war loans furnished by its subjects, we find, as Rivier has noted, that international law doctrine is at present much laxer upon this point than formerly, due to the increasing importance of financial transactions between nations, both in peace and in war Among the notable authorities on international law at the present day there is no one who would go as far as the earlier writers in the assertion of state responsibility. The considerations which determine the opinions of most of these authorities is the impracticability of any prohibition. Funck-Brentano, Dupuis, Lawrence, Hall, Holland, Rivier, and Fiore all believe in essence that "money being a form of merchandise most easy to transfer, commercial transactions in it could not be prevented except by an amount of espionage and interference which would render all trade impossible. The attempted prohibition of such transactions would be successfully met by secret credit operations which would be entirely beyond the reach of the government." We may note in passing that this argument does not invalidate the demand for a prohibition of

public advertisement and subscription. Some of these writers admit that public issues might be forbidden. But they seem to undervalue the importance of publicity in such matters. While credit operations could, of course, be carried on quietly or secretly by individuals, and moneys could be sent to foreign agencies, it seems to me that, nevertheless, the belligerent borrower would be deprived of a very distinct advantage if the public advertising or subscription of a war loan in a neutral country should be forbidden.

Lawrence adduces the consideration that as money is contraband of war, the neutral trader in it therefore lends at his own risk. This position does not seem to be well founded. Wiegner, the latest writer on contraband, holds that, with the present conditions of financial operations, the contraband quality of money has lost its meaning. As these very writers dwell upon the secrecy of financial operations, the argument in connection with the contraband quality seems of very little force indeed. To my mind the very fact that money is so easily transmitted by means of exchange lends some strength to the demand for restriction of neutral loans. Against the importation of ordinary contraband articles into the country of his opponent a belligerent can to a certain extent defend himself — especially by capture on the sea, but he does not enjoy this advantage in the case of credit operations. If these are publicly conducted under the protesting ægis of a nominally friendly government, the situation may easily assume the character of a substantial breach of neutrality.

Hall, in general agreement with these other writers, bases his opinion upon the fact that the principle contended for would constitute " a solitary exception to the fundamental rule that states are not responsible for the commercial acts of their subjects. Money is a merchandise, the transmission of which would elude all supervision." The same position is taken by Fiore in his International Law Codified. He says:

A government can not be expected to suspend the operation of its internal laws, which may authorize the acceptance of military service abroad, commerce in arms and munitions, the emission of loans, the furnishing of subsidies, the formation of aid committees. It must, however, apply these laws in such a fashion as to avoid all serious presumption of favor shown by it to the actions or commercial opera-

tions of individuals at their own risk during the war. Nor may the neutral government in any way diminish the risk assumed by its subjects in such matters.

These writers argue that as long as a neutral state can not be held responsible for the commercial operations of its subjects, though they may consist in furnishing arms and munitions to the belligerents, it would be illogical and unreasonable to call upon a neutral state to prohibit other normal commercial transactions, such as the negotiation and issuance of loans. Nor can it be denied that there is a strong logical connection between these matters. Yet as the furnishing of funds is the ultimate source and root of all warlike activities, it does not stand entirely on the same footing as the sale of ordinary materials of war.

At its meetings in 1906 and 1907 the International Law Institute discussed this subject in connection with the general rights and duties of neutrals. The reporter, M. Kleen, framed his original project in accordance with his views, which we have already noted. These principles were criticised by Van den Beer Poortugael and Holland. The former denied the practicability of a distinction between commercial and war loans. He further suggested that the forbidding of public loans would lead to hypocrisy, as secret operations would still be permissible. The general principle he attacked by urging that it went too far. If neutral subjects can not lend money to a government at war, could they furnish it funds by purchasing a concession, or some other privilege? That, too, he holds, would have to be forbidden under such a principle. In his amended project, Kleen stated the rule of international law to be that "subjects of a neutral state may furnish any kind of loans to belligerents" — a statement which in effect expresses the present status of this matter in positive international law.

It remains for us to consider briefly the practice of states in the past as affecting war loans in neutral countries. In 1795 the Senate of Genoa refused its authorization for the raising of a French war loan in that city. It is, however, evident that the statement that its action was due to a desire to fulfill the duties of neutrality was a mere pretext and that the action rested entirely upon political

grounds. In 1823, when Don Miguel was engaged in rebellion against Dona Maria of Portugal, he succeeded in negotiating a loan of 40,000,000 francs in Paris. The French Government did not forbid the issuance of this loan, and though later it refused its diplomatic assistance in the recovery of payment from the Portuguese Government, it did not at any time visit the loan with its authoritative condemnation, nor were diplomatic representations made by Portugal with a view of holding the French Government responsible. In 1842, Mr. Webster, as Secretary of State, made the following striking statement in connection with Texan war loans:

> As to advances and loans made by individuals to the Government of Texas or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in this as long as Texas is at peace with the United States, and that these are things which no government undertakes to restrain.

In 1823 the lawfulness of subscriptions for the benefit of the Greek revolutionists was submitted to the Crown lawyers of the British Government. The law officers held that "gratuitous subscriptions" by individuals of a neutral nation for the use of a belligerent state were inconsistent with neutrality and contrary to the law of nations, although they might not constitute a just ground of hostilities; but that "loans, if entered into merely with commercial views," would not be an infringement of neutrality, although if the "loan" was only a cover for a "gratuitous contribution" the transaction would constitute such an infringement. (Cited in Moore's Digest, Vol. VII, 976.) We may note in passing that public subscriptions for the assistance of a belligerent are generally frowned upon in theory as well as in practice. During the Spanish-American war, Uruguay interdicted the holding of theatrical performances for the purpose of raising money for the Spanish fleet, as well as the foundation of a Red Cross Society which was to lend succor to only Spanish soldiers. In France subscriptions in favor of Spain were, however, permitted at this time and no diplomatic representations were made by the United States. Calvo, Bluntschli, and other authorities specially except from prohibition subscriptions for the aid of wounded, etc. Politis has criticised this exception, holding that

if by such subscriptions a belligerent state is relieved of the cost of maintaining the sanitary service, it is to that extent subsidized toward warlike expenditure in other directions.

In 1854 a Russian war loan was negotiated by the house Steiglitz, of St. Petersburg. England and France entered objections against the issuance of this loan in Prussia and Holland. But while the Dutch exchanges refused to interest themselves in the loan, Prussia permitted her exchanges to take it up, and no attempt was made later to hold her responsible. In 1871, Gambetta raised the so-called Morgan loan of 250,000,000 francs in England for the benefit of France. During the same war the North German Confederation also negotiated a loan in Great Britain. Neither of the belligerents entered any objections. In 1873, a subscription was started in England in favor of the Carlist revolution in Spain. Mr. Gladstone, when questioned in Parliament, deprecated the subscription as virtually an unfriendly act, and appealed to a principle of the common law forbidding aid to a domestic enemy of a friendly power; nevertheless he refused to take any action in this particular matter, considering the offenses too unimportant to be punishable. In the Russian wars of 1878 and of 1904, war loans were freely placed in neutral countries, but no objection was made at any time. By readily taking advantage of neutral loans itself, a belligerent of course practically precludes his opportunity of making any representations against favors extended to his opponent.

The foregoing analysis of the doctrine and practice of international law in the matter of war loans in neutral countries leads to the following conclusions:

1. Under the present status of the law a neutral nation could not be held responsible by a belligerent for having allowed its subjects to make loans to the other party in the war.

2. The general desire of combatant powers to avail themselves of the opportunity to borrow money has in recent wars done away with the motive on the part of the belligerents to object to that practice.

3. The growing importance of international financial operations has rendered neutral powers reluctant to take a stand for the rule of responsibility.

4. Nevertheless, the public sense of justice has not been satisfied with the present practice, and there has been a distinct feeling that it is dangerous to the general interests of humanity.

5. Loans to insurgent juntas or governments have been visited with the condemnation of the courts.

6. This condemnation might be extended by the courts to war loans of any belligerent, so that such contracts would be vitiated as far as individuals are concerned.

7. Response to public sentiment might lead some neutral governments, as a matter of public policy, to forbid the public advertisement and issue of war loans.

8. All this would, however, not as yet establish the responsibility of the neutral state itself to answer in damages for the acts of its subjects. This could be brought about only if, after a particularly serious case of financial support to a belligerent, the offended party should be strong enough to obtain by treaty acknowledgment of such responsibility, followed by an arbitral award of damages as in the case of the *Alabama* claims. Or if an international congress of plenipotentiaries, such as the Hague Conference, should feel itself impelled by a fully developed public opinion to agree upon a rule establishing such responsibility in future cases.

9. It must also be noted, however, that the credit of a nation may be looked upon as a national asset, which ought to be available to it in times of need. The international organization of credit, moreover, has features which favor the development of peaceful and stable conditions throughout the world. Unless, therefore, the evils which may be attendant upon war loans should manifest themselves in a particularly acute form, the practice may continue to be used for an indefinite time.

The CHAIRMAN (Mr. Straus). Is there any further discussion upon this subject? If so it will be welcomed. There are no more set addresses upon this branch of the subject, and so discussion is invited.

I am requested to call attention to the fact that many members have not registered, and all who have not done so I ask to do so at once. At the end of this session to-day the Executive Council is to

meet, so the gentlemen who compose the Executive Council will please remain. The evening session, as you will see from the program, is to be held in this room at eight o'clock. The subject is: "Arbitration at the Second Hague Conference." Judge George Gray will preside, and General Horace Porter, fresh from the Hague Conference, will speak, as will also Mr. R. C. Smith, of Montreal, Canada.

Is there any further discussion upon this topic? If there is, as I have stated, it will be welcome.

Mr. Henry Stockbridge, of Baltimore, Md. Mr. President: There is one phase of the subject under consideration which has not been fully developed in the extremely interesting paper to which we have just listened, and in regard to which it seems pertinent to direct attention for just a moment.

Recent writers have inclined strongly toward the view of regarding money as a commodity dealt in by bankers, whether in time of war or in time of peace, and that the making of a loan by bankers of neutral states to a belligerent power in time of war was a dealing by this class of persons in a commodity. This attitude is recognized in the paper which has just been read. Money belonging to a belligerent is recognized as contraband, and liable to capture as such by the other belligerent, even if that money has been obtained by way of a loan from the subjects or citizens of neutral states. But the present proposition goes beyond that. It looks to treating the making of such loan by the neutral banker as an act violative of the neutrality of the state of which the banker making the loan is a subject or citizen, or if not an actual violation of neutrality, at least to classifying it as an unfriendly act.

Such a proposition appears to me subversive of the neutral rights for which the contest has been persistently waged for a long time, and which is now just beginning to receive its proper recognition. The doctrine of neutral rights in time of war which this country has claimed for its citizens — and the British view is practically the same — is that the occurrence of a state of belligerency between two or more powers should operate to interfere as little as possible with the commerce of neutrals with either or both of the belligerents, or, if it must interfere, that such interference shall be the smallest possible amount. For more than a century this is the principle for

which the United States has contended, and the acquiescence in this view has gradually been extended more and more.

If, now, we are to adopt the view that the loan of money by a banker or syndicate of bankers to a belligerent power is a violation of the neutrality or an unfriendly act upon the part of the neutral state to which the banker belongs, we at once begin a retrograde movement, so far as the rights of neutrals are concerned. If the making of such loans is to be regarded as a violation of neutrality, the effect is of course to commence limiting the rights of neutrals to engage in commerce with the belligerents. It is the entering wedge in this direction, and will of course be followed by limitations on other forms of commerce. Another equally natural limitation would be upon the furnishing by a firm or private corporation of a neutral state to either belligerent of arms or munitions of war (cartridges, for example); this would in turn be followed by an inhibition upon articles of food, since they might be applied to the use of the armed forces; then the manufactures of cloth and clothing for a like reason; electrical and railway supplies, fuel, and so on through a long list, which it is not necessary to further elaborate. Each of these would be just as proper a limitation on the commerce of neutrals as the limitation upon the bankers. The same arguments which are available to support the one are equally applicable to each of the others. Thus, the whole tendency of the proposition is to set at naught the essential rights of the citizens of neutral powers, rights which for so many years the most enlightened nations of the world have been striving to bring to complete realization. May we not well hesitate, both as a nation and as individuals, before we give our adhesion to so reactionary a doctrine?

I do not wish to consume the time of this body, but only to call attention to the fact that there are two sides to the question under consideration, which it will be wise to weigh with care before proclaiming an adoption of a theory which has so much of a backward tendency about it.

Mr. Crammond Kennedy, of Washington, D. C. Mr. President: It seems to me that we are under great obligations for the thoughtful and suggestive paper that has been read to us, and I think that we must all agree that the principle laid down by the Supreme Court of

the United States in the case of Kenneth v. Chambers is the only one that is consistent with international good faith and duty. It seems to me that as a rule it is the most presumptuous thing conceivable for a private individual to take an active part in a war against a country with which his own government is at peace.

Referring to the remarks that have been made by the gentleman who has just taken his seat, while it is true that there is a great deal of force, and especially from a commercial point of view, in the theory that belligerents ought not to be allowed to interfere with the free exchange of goods any further than possible, nevertheless there must be a consciousness that the supply of munitions of war and even of the means of sustaining armies, provender for the horses and provisions for the men, by subjects of so-called "neutral powers" — I say there must be a deep-seated consciousness that that is not neutrality; that it is not impartiality; that it is substantially interference and taking part with one of the belligerent parties. Why, if it were otherwise, should those cargoes of munitions, or provisions, the title to which is unquestioned in the private owner, be subject to confiscation if captured? If the thing were right, the property could not be taken away from the private individual without the grossest kind of a wrong. Capture and condemnation must be regarded as a penalty.

But I must beware not to get involved in any long argument. I merely wanted to point out what seems to me a modern instance of the most lawless kind of interference — I mean the operations of the late Cuban Junta. I do not believe that we have ever realized in this country what serious wrongs, what breaches of neutrality, were perpetrated — I mean for which the Government might have been fairly held responsible to Spain upon the principles applied in the Geneva arbitration.

There were hundreds of people born and reared under the allegiance of Spain who deliberately became citizens of the United States for the purpose of plotting in their adopted country against their original sovereign in violation of our neutrality laws. Let me give you an illustration. The man who afterwards became President of the so-called Cuban Republic raised funds, when he was a citizen of the United States, in aid of the insurrection in Cuba against Spain,

by going to other citizens of the United States in the city of New York and saying to them: "If you do not give me two thousand dollars, five thousand dollars, ten thousand dollars, or twenty thousand dollars, according to the value of your plantations or sugar works in Cuba, the insurgents will burn them." Now, think of that! That was done under the ægis of an acquired citizenship of the United States against the private personal rights of property of other citizens to the manner born, as well as in violation of the neutrality laws of their common country. When we remember that the United States was honeycombed with agencies of the Cuban Junta, which not only raised money but spent that money in organizing and equipping expeditions, the sale of the *Alabama* seems almost venial as an offense against international law; for here expeditions were organized, including men enlisted in the United States, that carried not only munitions of war to Cuba to help destroy, or to drive her out of that particular part of her dominion, a nation with whom we were at peace, but also soldiers to increase the forces operating against her, the military forces in the field.

Now, I say that the international conscience throughout the world should be so written into the public law, and should be so reinforced by new regulations in this behalf, that the rule should prevail that every man is a friend of that nation with which his government is at peace and amity, as every man is to be considered hostile to that country with which his government is at war.

Mr. CHARLES N. GREGORY, of Iowa City, Iowa. Mr. President: I do not wish to rank myself at all as opposed to any influence which shall promote peace, but it has seemed to me that the ability to freely negotiate loans tended to the equality of men in ordinary society, and that the same freedom to negotiate loans tends to the equality of governments, even in time of war, and that therefore the rigid rule which forbade assistance to another country in time of war would tend to give an undue continuous predominance to the nation which happened to be well supplied with cash.

I think that consideration ought not to be lost track of in the consideration of this matter.

The CHAIRMAN (Mr. Straus). If there is no further discussion of this topic, the Chair will declare the session closed.

EVENING SESSION

Friday, April 24, 1908

The Society met at 8 o'clock p. m., Hon. George Gray, of Delaware, in the chair.

The CHAIRMAN. Gentlemen, the program for the evening begins with an address by General Horace Porter, late our ambassador to France and also lately a member of the International Conference to The Hague, who will speak on the topic "Arbitration at the Second Hague Conference." He will be followed by an address by Mr. R. C. Smith, of Montreal, Canada.

ADDRESS OF MR. HORACE PORTER, OF NEW YORK CITY

[Mr. Porter's speech is omitted at his request.]

The CHAIRMAN (Mr. Gray). After this very interesting address of General Porter, we will have the pleasure of hearing from Mr. R. C. Smith, a distinguished lawyer and King's Counsel of our neighboring country, Canada. Mr. Smith is from Montreal.

ADDRESS OF MR. R. C. SMITH, K. C., OF MONTREAL, CANADA

Mr. Chairman, Ladies, and Gentlemen: If I had addressed you before the distinguished gentleman whom you have just heard, you might have treated what I have to say as a purgatorial prelude to elysian delights to follow, but as it is you can only regard it as a very somber afterglow after the brilliant diplomatic sun has set for the time being.

When I was invited to write a short paper, not by any means to exceed half an hour, I did not anticipate that I should present it to such an audience. I imagined it would be read around a small table

with a few gentlemen, knowing vastly more about the subject than I did myself, instead of which I find myself confronted with the real intelligence — because it is the real intelligence of every nation — the ladies — and you will have to listen to the croaking of a frog where you ought to listen to the silvery tones of a nightingale. All I can do is to read this very fragmentary paper — necessarily very fragmentary and suggestive because I have not attempted to reason out anything, but merely to refer very disjointedly to a few of the objections raised against arbitration, and if you will allow me to race over it — granting me what indulgence you are able to in this heat — I suppose that I shall have achieved everything that I can hope for in this mission.

I can scarcely claim that my addressing so many distinguished publicists and diplomatists upon a subject of international law resembles even the familiar anomaly of carrying coals to Newcastle. It would rather be like attempting to carry to that coal center a cargo of inferior slate and shale in a birch-bark canoe. And yet if I may judge by much that has been written upon the Second Hague Conference, I ought not to trouble myself about any special qualifications to write. Borrowing the language of Lord Byron to the editors of the Edinburgh Review:

> While these are censors, 'twould be sin to spare;
> While such are critics, why should I forbear?

As a humble observer, yet taking a deep interest in the progress of reason and principle in international relations, I could not read without regret the concluding sentences of the article in the January Edinburgh Review:

> A peace conference which is forbidden to discuss expenditure upon armaments and from which the rules of naval warfare have admittedly been withdrawn; a world congress which the world treats with silence or with ridicule; an assembly in which diplomacy and law confound each other, does not justify itself.

I could have wished that Byron could have returned to us long enough to say something more to the Edinburgh Review. And a writer in the Contemporary Review asks:

Do the delegates at The Hague, with their water-tight compartments of fine distinctions, their ingenious hair-splitting and scholastic casuistry, faithfully represent their respective peoples? Is distrust of each other one of the characteristic traits of the political communities of the world? If so no proposals, however well received at the conference, will uproot the causes of war; and so long as the cause continues in operation the effect will be produced necessarily. We must begin at the beginning.

Another writer, in the Atlantic Monthly, attributes what he is pleased to call the chief failures of the conference to the rivalry of England and Germany. And so in dailies and weeklies and monthlies, and even in stately quarterlies, we read that because limitation of armament was not agreed to, because arbitration was not made obligatory, because the laws of naval warfare were not codified, and, forsooth, because the causes of war were not eliminated and the holy calm of millennial peace forever assured, the Second Hague Conference was a failure. It appears to me, and I do not apologize for saying it, that there is far more cause for discouragement in much of the critical writing upon its work than in anything that occurred in the sessions of the conference itself — discouragement that so many who should be leaders of thought in their respective communities evince so slight an appreciation of the grand significance of the mere fact of such a conference at all, and so crude an impatience for stupendous results. We are told we must begin at the beginning and uproot the causes of war or nothing can be accomplished. The possible causes of war are in a large degree accidental and unforeseen, and will not diminish but increase as intercommunication increases. Merchants who have never seen or heard of each other are not likely to be embroiled in litigation. The frontiers of nations widely separated by distance are coming very close together, and it may be one thing to remove the possible causes of war and quite another to remove the necessity for war. There will probably be no difficulty in obtaining a general rejection of Colonel Maude's assumption in his recent book, "War and the World's Life," that "war is an indispensable necessity of human progress;" but if all effort is to be abandoned until we can uproot the causes of war, the prospects of peace are not the brightest. I have lately read somewhere the con-

trary of what I am now saying, viz, that the general dissatisfaction with what had been accomplished at The Hague was a most hopeful sign as indicating that the results had not registered the full progress of civilization and that the people were ready for much more tangible accomplishment. I confess that this dissatisfaction is, to me, more depressing than encouraging. We do not need to be told that the enlightened masses desire peace and not war, and that they earnestly and impatiently yearn for the establishment of some power, code, and court that will afford an easy solution of international difficulties. But if any real progress is to be made it must surely begin by some fair appreciation of the problem as it exists. It is easy to imagine utopian systems and to complain when they are not realized; but it is very much more useful to take a sane and practical view of the situation as it is and the reasonable possibilities in view of the vast diversity of present interests and historical development. Our estimate of what was done at The Hague will naturally be to some extent influenced by our own elementary notions of international law — whether we regard it, with Sir Edward Fry, as "little more than the chaos of opinion and of decisions of national courts," or whether we classify under the term "international law" all the moral forces of the world, or whether intermediately we adopt the purely historical view of it as comprising the usages and conventions of nations. The conception of Grotius, which Sir Henry Maine thinks taken directly from the Roman publicists, seems still to be the inspiration of much that is written on international relations. It was that man, living in a state of nature, without social organization, and therefore without positively prescribed law, would still be subject to certain rules of conduct, which were ascertainable from the nature of things and which he called "the law of nature;" that nations, being integers acknowledging no common superior, were like individuals living in a state of nature, and therefore that the law of nature was the code of nations. Vattel, pursuing the idea further, and realizing that nations do exist as entities independent one of another, and predicating that their relations must be determinable by some principle, calls the law natural the "*necessary* law of nations." So, among the modern writers, we have M. Pradier-Fodéré, who defines the scope of international law study as follows:

Le champ de cette etude est la recherche *de ce qui doit etre,* et la constatation *de ce qui est;* elle recherche donc et elle constate: d'ou deux points de vue: la theory et la realite.

He groups Burke, Hugo, Savigny, Mommsen, Strauss, and Bluntschli under the name of the historical school, who, he says, do not occupy themselves with rational principles but merely with historical realities, and he sums up the question in these words:

To say that there is no international law beyond the customs followed or the obligations contracted by states is to exclude from international law that which is a fact and a law — the necessary principle of moral order superior to human will, which binds individuals — and is to transform law into a simple science of material observation.

With such high ideal we must, of course, all be in sympathy. John Bright, in stating his reasons for resigning from Mr. Gladstone's Cabinet, said he held the moral law to be binding upon nations as upon individuals, to which Mr. Gladstone readily assented, differing only in the application of the law. This was made as a purely ethical statement, but if offered as a legal proposition it is obvious that it lacks what I believe the French call in mechanics a *point d'appui.* We can not speak of law without associating it with the coordinate and independent branches of government, the legislative, the judicial, and the executive; but upon what shall we rest the statement of the binding force of the moral law between nations. As Wheaton says, there is no legislative or judicial authority recognized by all nations; they have not as yet organized any common paramount authority. We may reject Rousseau's theory of the social compact as to the origin and force of law, but in the last analysis what else is there between nations? Even if some "common paramount authority" were organized, and all the great powers of the world pledged their armies and navies to enforce the decisions of such authority, the whole fabric would still have its basis in contract, and would subsist only so long as the powers carried out their agreement. There would always be the possibility of the sub-combination of some of the powers, and the adventitious interests of others, causing a rupture of the concert upon which the whole international authority rested. Public opinion, representing the conscience of the majority

of its citizens, would of course operate in each state to influence its government in the direction it thought right, but the basis of the whole relation created between the nations would be simply treaty. While doing everything possible to cherish the truest and highest ideals, is it not just as well to recognize that for all practical purposes betwen nations *contractus legem facit?* M. Tallichet may be right in his belief that religion, freed entirely from state control, will prepare the way for universal peace and harmony between the nations, but even if it be so it will be through the making and faithful carrying out of wise and humane treaties.

Lord Stowell said that the law of nations was to be found in great part in the usages and practices of nations, and a recent writer in the Spectator said international law was largely a matter of moral sanctions. It will resolve itself into agreement, express or implied.

In what position, then, did a delegate to the Hague Conference find himself? He found himself among the representatives of forty-five or forty-six sovereign states exemplifying diversity in language, government, law, and national interests generally, as great as the world can know. His mission was not to negotiate a treaty with a friendly power, but to induce all the nations of the earth to negotiate a world treaty. Nor was it, as has been said, merely to induce them to register their agreement that the moral forces of the world had achieved so much in international relations in peace and war, though this in itself would have been a great result. It was to constrain them to agree to something better than treaty or practice had yet shown, and this in respect of a vast range of most complicated and delicate subjects. The magnitude and difficulty of the work, and the tremendous importance of the slightest advance made, must be realized before the results can be truly estimated. The questions relating to arbitration were perhaps of the greatest moment of any discussed; for if arbitration could by general treaty be firmly established as an international institution, with a code of international laws and a permanent international court commanding the world's confidence, most of the other evils aimed at would in logical sequence disappear in time. One of the formidable difficulties encountered from the outset was the claim of the minor states to absolute equality of influence

with the great powers, upon the plea that all sovereign states are equal. The brilliant and even vehement assertion of the claim of the smaller states, by Dr. Barbosa, of Brazil, was one of the features of the conference, and opened a question which will not be settled very easily or very quickly, and may prove a serious embarrassment in future conferences. If I venture to say anything on the subject before this association it is only in the way of modest suggestion for your consideration, and because it has been assumed by some writers that the granting of voting powers to the representatives of minor states was in effect a recognition of their claim to equality. Sir Henry Maine says this equality of sovereign states was never universally acknowledged until the doctrines of the Grotian school had prevailed. He adds:

> If the society of nations is governed by natural law, the atoms which compose it must be absolutely equal. Men under the scepter of nature are all equal, and accordingly commonwealths are equal if the international state be one of nature. The proposition that independent communities, however different in size and power, are all equal in the view of the law of nations has largely contributed to the happiness of mankind, though it is constantly threatened by the political tendencies of each successive age. It is a doctrine which probably would never have obtained a secure footing at all, if international law had not been entirely derived from the majestic claims of nature by the publicists who wrote after the revival of letters.

There will be a natural reluctance to wound the sensibilities of the smaller states, but the question will have to be discussed, and much discussed. In all the attributes of sovereignty and in territorial integrity they enjoy equality, whether this equality came to be recognized through the doctrine of the *lex naturæ* or through other less abstract motives connected with the balance of power. But the argument that because each in its own sphere enjoys independence and sovereignty the least should have equal influence with the greatest in the world's general affairs, and in particular in the establishment of an international tribunal of arbitral justice, is obviously fallacious. The pretension that the claim of the minor states was that of right against might had the merit of rhyme, but nothing else. In the titular equality of sovereign states, is all the real inequality

to be forgotten? The immense inequality in population, in material resources and contribution to the material progress of the world, in the development of juridical science, in their experience of international relations, and, not least, the inequality resulting from the instability of their own governments, must be considered in determining the influence they are rightfully entitled to exert in a world's congress.

The world is not without examples, even in the most highly civilized nations, of states enjoying equality and independence within their own autonomy, and yet exerting influence in national affairs according to a just and reasonable apportionment of elective power. Of course it is true, as said by Dr. Barbosa, that nations will never submit to any authorities but those which they themselves create. It is altogether a matter of agreement. But it will greatly retard progress if the establishment of the Court of Arbitral Justice is prevented by the ambitious claims of the smaller states. Their rights might possibly be safeguarded to their satisfaction by a provision that any state that has no representative upon the court should, when its own interests are before the court for decision, have the right of nominating a judge *ad hoc*. This would obviate the possibility of the interests of minor states being disposed of without their being represented upon the tribunal.

Another major difficulty was voiced by the Japanese envoys — the reluctance to submit to a court that would decide upon principles of law which possibily might not be recognized or might even be repudiated by Japan. Thus, we hear on one side objections to the court until some code of international law is agreed upon, and upon the other side objections to any attempts to agree upon a codification until a court is established capable of giving it effect; or, in other words, on one side it is asked: "What is the use of an international court until we know what laws it is to apply?" and on the other hand: "What is the use of a code of laws if you have no court to give them effect?" That one is the complement of the other is evident; nor can it be denied that the consideration of both must be to some extent concomitant. It would be very unfortunate if both were shelved because of difference of opinion as to which of the two ques-

tions should have priority. It might be argued that the logical order is first to agree upon the laws and then upon a tribunal to apply them. Added to this is the fact that the cooperation of some powers in the establishment of the court will probably be conditioned upon the antecedent agreement as to the laws. On the other hand, there is a body of principles sanctioned by the positive agreements of most nations, and by their tacit agreement as evidenced by their practice, which the court, if created, could at once apply. And it is probable that the questions submitted to the court would principally relate to the special class of differences which the convention declared susceptible of being submitted to obligatory arbitration without restriction, viz, "those relative to the interpretation and application of conventional stipulations." If, therefore, agreement can be secured to create the International Court of Arbitral Justice, its beneficent influence will be immediately felt, and the most important advance in history will have been made in international law.

Until such a court is created can any progress be made in the other question so closely related to it, that of codification? Dr. Oppenheim (International Law, Longmans, 1905) has a brief but instructive chapter upon it. Discussing the objections to codification generally, he inclines to the view that there is a tendency after codification to adhere to the letter rather than the spirit, but he admits that history has given its verdict in favor of codification; that by it many controversies have been done away with; that by it the science of law has always received a new impetus; that a more uniform spirit is introduced, and that many mortifying branches and principles have been cut off. He deals tersely with the objections to the codifying of international law. First, as to the differences in languages and technical terms; this objection might with equal force, he says, be raised against all treaty making between nations, yet it has never been found to present insurmountable difficulties nor to prevent the concluding of such treaties as the nations desired to make. The second objection, that codification would cut off all organic growth and development of international law, he shows could be met by periodical revision. Regarding the third objection, that an international court, with power to enforce its verdicts, is indispensable to an uniform interpretation, he says:

If there is a law of nations in existence in spite of the nonexistence of an international court to guarantee its realization, I can not see why the nonexistence of such a court should be an obstacle to codifying the very same law of nations. It may indeed be maintained that codification is all the more necessary as such an international court does not exist. For codification of the law of nations and the solemn recognition of a code by a universal law-making international treaty would give more precision, certainty, and weight to the rules of that law of nations than they have now in their unwritten condition.

Two other hindrances to the cause of arbitration can be merely mentioned: First, the assumption, which seems to be general, that in the most favorable aspect of it the scope of arbitration is limited, and that there are many international differences which do not lend themselves to judicial formulæ and are not susceptible of decision upon judicial principles. I venture to suggest that this assumption ought to be reconsidered. There is no radical reason why questions relating to national honor and vital interests could not be arbitrated. Perhaps the real reason of this reservation from arbitration, which as I said seems general among writers and diplomatists, is that every nation desires to prescribe and if necessary to maintain its own "sphere of influence." In most questions the controversy will be resolvable into whether or not there has been international aggression which ought to be possible of settlement upon appeal to principle. Second, a reluctance to submit to arbitration owing to the admixture of diplomacy and arbitration. This was frankly, and I think justly, discussed by General Harrison in his Venezuelan argument. The two proceed according to different methods and different principles, and the sooner diplomacy and arbitration are quite separated the sooner will the world feel that it can invoke arbitration without danger; that interests may be sacrificed to expediency and compromise in the no doubt laudable desire to preserve the peace.

But I am already exceeding the time allotted to me. The establishment of an international court and the adoption of an international code naturally could not be accomplished in a few months' congress, but great progress was made in the direction of both. The differences of opinion expressed and the limited range of the positive

conventions, that the critics find so disappointing, is evidence that the congress was conducted with frankness and sincerity and that the progress made was real and not illusory. Notwithstanding the testimony of history that civilization advances by evolution rather than revolution, there are always many who clamor for the latter. Because no convention was adopted providing for obligatory arbitration, what was achieved is belittled. I can not now discuss the conventions, with which you are familiar, but I may be allowed to say that I believe the significance and value of the formal recognition of the principle of obligatory arbitration can scarcely be overestimated. Its natural effect will be to prepare the way for the negotiation of an obligatory arbitration treaty, if not by all, by a majority of the great powers, and in the meantime, if I may so express it, it has established more securely than ever before an overwhelming presumption in favor of arbitration.

Not because there is no reason why it should be particularly unpopular before this audience, but because it is an indisputable fact, I feel that I may without indelicacy refer to the great influence of the representatives of this nation at the recent conference. Mr. Choate, General Porter, and the other delegates went to it with great experience in diplomacy, with a full realization of the difficulties, but with a high purpose not only to achieve concrete results but to establish ideals, supported by the consciousness that the nation they represented would endorse the position that national greatness may have some higher purpose than triumph of arms; that truth and right are greater than even victory, and that in the silent progress of time the sublimated intelligence of mankind will do reverence to those men and those nations who could distinguish between force and principle, and whose aspirations and genius were the advancement of justice and freedom.

The Chairman (Mr. Gray). I suppose the general subject is open to any further remarks, if any members wish to make any.

Mr. S. Gurgel do Amaral, of Brazil. Mr. Chairman: I am the counselor of the Brazilian embassy to this country. I beg leave to say a few words regarding the masterful address just delivered by

the honorable gentleman from Canada. He discussed in a thoroughly interesting manner the inequality of states based upon the difference of populations, of magnitude of interests, or territorial extension, etc., of the several states of the earth. In order to contribute, as a Brazilian citizen, as much as possible, to the elucidation of the attitude of the Brazilian delegation at The Hague, I beg to say that the views of the Brazilian Government — those of its delegates at the Hague Conference, and those of the large majority of the twenty-five million people inhabiting Brazil — were chiefly for the formal recognition of the undeniable sentiment that prevails nowadays, namely, the juridical — mark well, the juridical — equality of all the states of the civilized world.

The CHAIRMAN (Mr. Gray). Are there any further remarks? If not the Chair will give the following notice: The Executive Committee of the American Society of International Law desiring to continue the publication of the JOURNAL at its present standard of form and quality, respectfully invites subscriptions to a special publication fund, to be devoted solely to the purpose aforesaid. I need not say to the members of this Association, all of whom must be familiar with the publication of this Society — the JOURNAL OF INTERNATIONAL LAW — how important it is that its work should be continued, and if possible extended. It has come to us almost *ex gratia;* it has cost us little or nothing, and we would all regret to know that its work was interfered with because of the want of a small contribution which would continue and extend its influence. I know of no work — certainly no journal — devoted to this subject which has exhibited so much of ability and contributed so much of instruction to the students of international law as the JOURNAL of this Society. There are a number of blanks here for the use of those who wish to contribute some small amount to the end I have mentioned.

After the adjournment of this meeting the Board of Editors will have a session in this room, or some adjoining room.

[Upon motion, the Society thereupon, at 9.45 p. m., adjourned until Saturday, April 25, at 10 o'clock a. m.]

MORNING SESSION

Saturday, April 25, 1908

The meeting was called to order at 10 o'clock a. m. by Vice-President General Horace Porter.

The CHAIRMAN. Gentlemen, the meeting will come to order.

I shall first call upon Professor Wilson, of Brown University, so well known in connection with the admirable work that he has accomplished at the Naval War College, who will speak to us about the work of that college in connection with the codification of international law.

ADDRESS OF MR. GEORGE G. WILSON, OF PROVIDENCE, R. I.

Mr. Chairman, Ladies, and Gentlemen: The United States Naval War College is in Newport. It was established in 1884. Rear-Admiral (then Commodore) S. B. Luce, who had foreseen the necessity of such an institution, was its first president, and has been permitted to live to see even more than his early ideal realized. His successors in the office of presidency include Admirals Mahan, Taylor, Goodrich, Stockton, Chadwick, Sperry, and Admiral Merrell, the present head of the college.

The Naval War College is not a college in the sense in which that term is ordinarily used in the United States. At the Naval War College there is no division into teachers and taught. All are alike students of the science and art of war. All are instructors. When it is considered that the officers brought together at the Naval War College have almost without exception seen long service, the youngest officer at the college in 1907 having been in active service twelve years after graduation from Annapolis and the average term of service of those present being thirty years each, the value of the conferences of such men upon professional affairs can easily be under-

stood. In addition to these, certain army officers join actively in the conferences in order that no point of view may be neglected.

These officers of mature years and of varied experience unite in considering the most important questions bearing on maritime warfare. The college becomes, as has well been said, "a place of original research upon all questions relating to war and to statesmanship connected with war, or the prevention of war." Here is fully realized the *truth* of Washington's maxim, "To be prepared for war is the most effectual means to promote peace," and here is realized the *falsity* of the ancient maxim that "war is the best school for war," which Admiral Luce calls "one of those dangerous and delusive sayings that contains just enough truth to secure currency; the one who waits for war to learn his profession often acquires his knowledge at a frightful cost of human life."

The necessity for the existence of such a college has been realized in other countries as well as in the United States, and following the example of the United States institutions of similar character have been established.

The early years of an officer's training prepare him for the handling of a single ship. In the multitudinous duties connected with such a command there is little opportunity even for the most ambitious officer to consider broad questions of naval science and policy. It was formerly the case that officers had little or no opportunity to consider together the problems involved in the great interests intrusted to them, the problems consequent upon the changes in ships, armaments, and projectiles, and the problems arising from the readjustment of international relations. Even if the officers had come together from time to time, the results of their labors might easily be lost if there were no place at which the results of their work might be preserved and coordinated. The Naval War College furnishes the conditions under which conferences of officers of the higher grades may be productive of the greatest benefit. The topics ordinarily considered relate to battle tactics, strategy of the fleet, and unsettled questions of international law. These topics are selected in advance as seems desirable from the course of events, or from questions referred by officers in all parts of the world to the

staff of the War College. The available information upon the subjects to be considered is gathered at the War College. The special library of the War College and its archives, maps, and plans are available for the conferences. The results of the conferences of a given year are preserved in the files and are thus immediately available for the officers assembling in conference in following years. Many questions from the Navy Department may be answered at once from the archives and files of the War College, as it is the purpose of the War College to anticipate questions and situations which may arise.

This is the general character of the work of the Naval War College. None of the work shows a desire for war, but all gives evidence of a desire to be prepared to wage effective and just war, if war arises.

A president of the War College has recently written of the work in international law as follows:

A portion of the work of the War College of grave importance is the discussion of questions of maritime international law, particularly in the matter of insurgency and the respective rights and duties of neutrals and belligerents. That portion of the law embodied in the form of international conventions and agreements is very limited, and beyond that the law must rest upon precedents and justice. Under such peculiar conditions the discussion of the proper course of action in a case where the law has not been settled requires not only the services of one familiar with the law and precedent, but it also requires the advice of those capable of judging of military necessities and the nature and bearing of precedents. For instance, the tendency is toward increasing respect for private property, but an excessive respect for property rights may result in prolonging a war at the expense of untold suffering. If a belligerent, rather than disturb a neutral submarine telegraphic cable — a damage which can be paid in coin — permits a crushing blow which would end the war to miscarry, he is guilty of the grossest inhumanity.

Fully appreciating this state of affairs, the conference of officers, most of whom during their long career have been called upon at one time or another to decide quickly what must be done to save life and property, devotes a large portion of its time for four months to the discussion of cases of living and urgent interest, with the aid of a lecturer, the resulting opinions being formulated and published as a guide for the officers of the Navy.

The accepted and formulated law can be acquired at leisure, but such work as the above can not be done in the closet.

The method of handling topics relating to international law is as follows: The questions are formulated before the opening of the conference by some person familiar with international law, in consultation with the president and staff of the college. When the conference assembles, the officers are divided into committees. The questions in international law are submitted to each committee. These committees, without consultation with each other, submit reports upon the several topics. These reports are considered by the one advising upon international law and are then fully and freely discussed in a conference participated in by all the officers gathered at the War College. The questions are necessarily considered from all points of view, as the officer may be called upon in actual service to face such problems when the United States may be a neutral, a belligerent on the offensive, or a belligerent on the defensive. The conclusions of the conference may therefore be fairly held to be without bias. The topics considered in a given year will give an idea of the range of discussion of the conference. In 1901 the topics considered by our distinguished colleague, Prof. John Bassett Moore, at the War College were Coast Warfare, particularly the bombardment of unfortified towns; Contraband, involving the doctrine of continuous voyage; Transportation of Military Persons; Neutrals; and Enemy Convoy, Insurgents, and Contraband. The topics considered at the recent conference of 1907 were as follows: Fugitives from Justice in Leased Territory, Status of Auxiliary Vessels in Foreign Harbors, Right of Captured Vessel to its Flag, Resistance to Capture, Destruction of Neutral Vessels, Violation of Blockade, Carriage of Contraband, Collier Service, Insurgency and Carriage of so-called Contraband, Wireless Telegraphy. The aim from year to year has been to anticipate questions which may arise in regard to which there may be uncertainty or entire lack of precedent, and to give a solution to these questions, which so far as possible shall be in accord with broad principles and without partiality. Such work must necessarily precede the codification of law, for codification is not so necessary when all states and authorities are in

agreement as to the proper course of action under the given circumstances.

However, the Naval War College has taken an active interest in the formulation and codification of international law. In 1899 Captain Stockton, then president of the Naval War College, in accordance with instructions from the Secretary of the Navy, entered upon the preparation of a naval war code which should serve for the Navy the purpose which Dr. Lieber's code, published in 1863, had served for the Army. Captain Stockton consulted with various officers of the Navy and with several civilians who were interested and familiar with the maritime international law of war. The preliminary draft of the code prepared by Captain Stockton was sent out with the following memorandum:

The regulations respecting the laws and usages of war at sea, a preliminary draft of which is herewith forwarded, are proposed, primarily, to be put in force for the Navy of the United States. For that reason, and on account of our existing laws in regard to privateers and the capture of enemy merchant vessels, the articles relating to privateers and letters of marque, and to the capture and destruction of private property at sea, are included in the code.

If the code should be presented to other countries as an international *projet,* it is presumed that these articles would be omitted or modified, in view of our adherence to the Declaration of Paris during the late war and of the stand, as to the capture of private property at sea, taken by the President of the United States in a recent message and in his instructions to our representatives at the Hague Conference.

The regulations for the laws of war upon land, adopted at the Hague Conference, cover a number of subjects that are applicable to the naval service afloat and ashore, such as those bearing upon matters of prisoners, spies, military occupation, etc., and hence these matters are not included in the naval code, which extends, by article 55, the authority of the laws of war to the naval service, when applicable and when not in conflict with the proposed naval code. These regulations for land warfare, as adopted at The Hague, accompany this memorandum and have been adhered to by the United States, but are not yet in force for the Army of the United States, though it is presumed that, after submission to and confirmation by the Senate, they will be duly promulgated and authorized. * * *

In addition to the manifest advantages of a formulation and crys-

tallization of the laws and usages of naval war (a work that has never before been attempted, it is believed, by any other nation), it is also hoped that this code will tend toward the amelioration of the hardships of naval warfare in general, and more particularly in the following respects:

1. By the adoption of all that is of practical value to be found in the additional articles proposed at The Hague to extend the articles of the Geneva Convention to maritime warfare.
2. By restricting to narrow limits the bombardment of unfortified and undefended towns.
3. By forbidding bombardment as a means of levying a ransom upon undefended towns.
4. By forbidding the use of false colors.
5. By forbidding reprisals in excess of the offense calling for them.
6. By exempting coast fishing vessels from capture, where innocently employed.
7. By incorporating the liberal allowances for vessels of the enemy at the outbreak of war, and for blockaded vessels, given in the General Order No. 492, of 1898, of the Navy Department.
8. By providing definitely that free ships make free goods.
9. By giving all the exemption possible to mail steamers in time of war.
10. By exempting neutral convoys from the right of search.
11. By promulgating the general classification of contraband of war in such a manner as to make an international adoption of the general principles possible.
12. By authorizing the use of the regulations for land warfare, whenever applicable, to the naval service of the United States. This has not been officially done heretofore.

I am, very respectfully,

C. H. Stockton,
Captain, U. S. Navy,
President Naval War College.

These points and many others were considered and several tentative drafts of the code were made. These were subjected to the criticism of various officers of the Navy and to several other persons outside the Navy. Captain Stockton's untiring labor in the preparation of this valuable compilation deserves high recognition.

The code was finally issued in accord with General Orders No. 551, Navy Department, Washington, June 27, 1900, which states:

The following code of naval warfare, prepared for the guidance and use of the naval service by Capt. Charles H. Stockton, United States Navy, under direction of the Secretary of the Navy, having been approved by the President of the United States, is published for the use of the Navy and for the information of all concerned.

JOHN D. LONG, *Secretary.*

The issue of the code very quickly called forth expressions of opinion from foreign sources, though not especially widely mentioned in the United States. It has been translated several times and has been made the subject of both practical and academic discussion. The following are examples of expression of opinion from English sources:

(From London Times, Friday, April 5, 1901.)

A NAVAL CODE

From a Naval Correspondent

There has been recently issued to the officers of the United States Navy a compact handbook of twenty-seven pages and fifty-five articles comprising laws and usages of war at sea. As the work is quite unknown in England, and as it includes a great deal of matter that must affect the policy of other nations, it is proposed to summarize briefly in this article some of its most salient features. In the first place, we are concerned as to the official sanction to laws given in the general order prefacing the handbook, informing us that it is "Prepared for the guidance and use of the naval service, by Capt. Charles H. Stockton, under the direction of the Secretary of the Navy, having been approved by the President of the United States." * * *

After discussing some of the topics considered in this code, the correspondent further says:

Section V deals with the exercise of the right of search, which is confined to properly commissioned and authorized vessels of war, convoys of neutrals being exempt on the commander of the convoys being able to give proper assurances. The right of search is universally recognized as necessary to a belligerent to enable it to ascertain the nationality of a vessel for the purpose of preventing breaches of blockade, and in other circumstances to seize vessels employed in any capacity for the enemy except that of carrying goods which are not contraband of war.

Further actions justifying seizure are:

1. Attempt to avoid search by escape; but this must be clearly evident.
2. Resisting search with violence.
3. Presenting fraudulent papers.
4. Vessels not being supplied with the necessary papers to establish the object of search.
5. If papers are destroyed, defaced, or concealed.

How far our own naval officers or the foreign office could justify the seizure of the German ships for which we had to pay compensation, under any of the above heads, is a matter of pure conjecture. It may, however, be confidently predicted that their task is not rendered easier by leaving so much to common sense which it is unwise to assume too confidently will be found in the right place at the right time. In the absence of any teaching on international law, except for a few lectures to some fortunate captains and commanders at the Royal Naval College, the least that might be done is to afford them such aid as the American Navy Department does to its own officers. This little code of laws deserves to be noted as another product of the United States Naval War College, to which we owe Captain Mahan's work on sea power; while in comparison Great Britain is content to spend £200 per annum on a naval strategy course, which includes a lecture on naval history, fee of £5 a lecture. Small wonder that in such circumstances the field produces so little, and the official representative of the Admiralty informs the House that his sympathies are with the hostile critics of the naval educational system on this question of the higher training of the navy.

On April 10, 1901, a letter to the Times from the distinguished British authority on international law, Professor Holland, concluded as follows:

It is worth considering whether something resembling the United States code would not be found useful in the British navy. Our code might be better arranged than its predecessor, and would differ from it on certain questions, but should resemble it in clearness of expression, in brevity, and, above all things, in frank acceptance of responsibility. What naval men most want is definite guidance, in categorical language, upon those points of maritime international law upon which the government has made up its own mind.

I am, sir, your obedient servant,

T. E. Holland.

Oxford, *April 8.*

In the original preparation of the code, certain debatable points were submitted and opinions upon them asked. These were as follows:

1. Prohibition of bombardment of open or unfortified towns on seacoast.

2. Adoption of additional articles of Geneva Convention as formulated at The Hague, with the exception of article 6 and the addition of a proviso to No. 3, that all neutral hospital ships shall, before and during action, attach themselves to one belligerent or the other and be subject to its regulations and fly its flag at the main, with red cross underneath.

3. Prohibition of use of false colors by men-of-war at any time.

4. The abolition of the *jus angariæ* or seizure of neutral vessels or property for war purposes, except in the case of overpowering military necessity.

5. Exemption of fishing boats and fishermen; fish to be paid for if seized as a military necessity.

6. The exercise of the right of inquiry upon neutral men-of-war approaching a blockade or investment. If false colors were universally prohibited this would not be necessary.

7. Ransom of unfortified towns: If refused, the penalty. Should it be forbidden?

8. Should such a status as war rebel be further recognized? *Vide* Lieber's G. O. 100, Inst. to Armies, etc.

9. Is a collier attending a fleet of an enemy guilty of unneutral service or only of carriage of contraband of war? Should vessel and cargo be both seized?

10. Should a continuous-voyage liability be applied to vessels carrying goods that are contraband or presumably for the violation of blockade?

11. Should multiplied retaliation be severely prohibited, *i. e.*, the shooting or hanging of more than one for one, etc.?

At the conferences of the officers at the Naval War College in 1903, the Naval War Code of 1900 was made the subject of discussion. Preparatory to this discussion opinions were sought from the leading authorities upon international law and also from officials

in many foreign states. Opinions in various forms were secured from many countries, including England, France, Germany, and Italy. There was a concurrence among these opinions to the effect that there should be a code including the points upon which states were agreed and those points upon which states could be brought to an agreement. The officers of the conference of 1903, after careful consideration of the code of 1900, came to certain conclusions which are indicated in the following preliminary report of the work of the conferences:

From the extended discussions of the sessions of 1903 and from the consideration of the conclusions of writers and others who have expressed opinions upon the code there come into prominence several points which seem to deserve particular and immediate notice:

1. The Naval War Code is binding upon the Navy of the United States, though it is not binding upon any state with which the United States may be at war.

2. The Naval War Code contains some provisions upon which there is not at present any international agreement, and upon which there are differences of opinion among the authorities upon international law.

3. In case of war, the Navy of the United States might be placed in a position such that the enemy would be free to commit certain acts not forbidden by international law, but sanctioned by general practice, which acts the Navy of the United States could not perform because forbidden by the code.

4. Certain articles of the code should in any case be amended and rewritten.

5. The Navy Department, by General Order 551, of June 27, 1900, published the code, under the approval of the President of the United States, "for the use of the Navy and for the information of all concerned." The code is therefore regarded as the official statement of the United States upon matters of maritime warfare. As such it has received careful and approving attention abroad.

6. It is an almost unanimous opinion at home and abroad that there should be a code for maritime warfare.

7. The Hague Convention of 1899 recommended that various matters relating to maritime warfare upon which the code of the United States touches, as well as some not included, be referred to a subsequent conference. Among these matters were some particularly urged upon the conference of 1899 by the delegates from the United States.

8. The Naval War Code of 1900 was originally drawn with the hope that it possibly "should be presented to other countries as an international *projet.*" The code is particularly adapted to serve such a purpose.

9. The United States would be following a course consistent with its past history and consistent with its attitude at the Hague Conference in urging an international agreement upon the rules of war at sea.

As a result of all of these and other considerations it was the opinion unanimously given by those in attendance upon the summer session of 1903 of the Naval War College that it would be advisable:

(1) That the proper steps be taken for the calling of an international conference for the consideration of the matters referred at the Hague Conference and for the formulation of international rules for war at sea.

(2) That the Naval War Code of the United States be offered as a tentative formulation of the rules which should be considered.

(3) That pending the calling of an international conference upon the laws and usages of war at sea, General Order 551 be withdrawn in order that the delegates from the United States might be unrestrained.

(4) That if the code be reprinted before the conference is called, it be issued not as an order, but, with revisions, as a statement of the rules which may be expected to prevail in case of war upon the sea.

The code was revoked by General Order No. 150 in the following February.

GENERAL ORDER No. 150.

NAVY DEPARTMENT,
WASHINGTON, *February 4, 1904.*

By direction of the President, General Order No. 551, dated June 27, 1900, publishing a naval war code for the use of the Navy and for the information of all concerned, is hereby revoked.

WILLIAM H. MOODY,
Secretary.

This Naval War Code was then made the basis of instructions to the United States delegation to the Hague Conference of 1907. In the instructions to the delegates, Secretary Root says:

As to the framing of a convention relative to the customs of maritime warfare, you are referred to the Naval War Code promulgated in General Orders 551 of the Navy Department of June 27,

1900, which has met with general commendation by naval authorities throughout the civilized world, and which, in general, expresses the views of the United States, subject to a few specific amendments suggested in the volume of international-law discussions of the Naval War College of the year 1903, pages 91 to 97. The order putting this code into force was revoked by the Navy Department in 1904, not because of any change of views as to the rules which it contained, but because many of those rules, being imposed upon the forces of the United States by the order, would have put our naval forces at a disadvantage as against the forces of other powers, upon whom the rules were not binding. The whole discussion of these rules contained in the volume to which I have referred is commended to your careful study.

You will urge upon the Peace Conference the formulation of international rules for war at sea and will offer the Naval War Code of 1900, with the suggested changes and such further changes as may be made necessary by other agreements reached at the conference, as a tentative formulation of the rules which should be considered.

It will be seen from this review of the work of the United States Naval War College that it has indeed been a leader from the beginning in the endeavor to formulate unbiased opinion upon the topics relating to the law of maritime warfare, and that it has frequently taken positions which were in advance of those which international conferences have found it possible to agree upon. This is easily seen in the conclusion of 1905 upon the treatment of private property at sea in time of war, which was then formulated as follows:

Innocent neutral goods and ships are not liable to capture.

Innocent enemy goods and ships, except vessels propelled by machinery and capable of keeping the high seas, are not liable to capture.

These conclusions followed the traditional policy of the United States. As the position of the United States in this matter was not supported at The Hague in 1907, the Naval War College will now be obliged to guide its deliberations accordingly.

The officers in attendance upon the Naval War College conferences have shown by their work and discussions that they are most anxious for the adoption of such regulations as will in reality promote the cause of peace and conduce to the well-being of humanity. In the

work of the Naval War College, the international law of the chair is modified by the practical experience of officers and by their knowledge of the action necessary for the preservation of the national safety which is to so great an extent placed in their hands.

In an address of the Assistant Secretary of the Navy, 1901, a case illustrating the work of the Naval War College was mentioned. Rear-Admiral Sampson, visiting the Naval War College soon after the Spanish-American war, " saw suspended on the wall a large chart of the Cuban coast. It bore certain marks that denoted the movements of war vessels. The Admiral took this chart to be a chart that had been prepared for the purpose of illustrating certain features of the Spanish war. It turned out, as a matter of fact, that he was looking at a working model that had been put in use two years before the war in the study of an imaginary campaign against Spain."

As in this case in strategical work, so in the work in international law, the aim is to anticipate so far as possible situations that may arise, to obtain the fullest information as to the proper course of action in accord with opinion and precedent if there be such, and to determine upon the expediency and feasibility of a given course of conduct.

The conclusions reached are tempered by the maturity of judgment of officers long in the service on land and sea who have seen the actual operation of regulations in international relations and who have often been compelled to act at shortest notice without precedent or general order. These officers therefore fully realize the importance and need of reasonable rules and of a code which shall be just to all nations. They are faithfully and unselfishly endeavoring to contribute to a code which shall, if possible, preserve peace and in the unfortunate event of war hasten its termination through conduct that shall be just and humane.

The CHAIRMAN (Mr. Porter). Gentlemen, as one of the delegates to the Hague Conference, I can amply testify, and gladly do so, to the great assistance derived in the conference from the knowledge that has been acquired and the great questions that have been thrashed out by the Naval War College here; and we were most happy in having present a naval delegate in the person of Admiral

Sperry, who has been the president of this War College, and who brought with him to the discussions of the conference a wealth of knowledge upon all these subjects.

The next gentleman whom I shall call upon will be Mr. Jackson H. Ralston, who is a member of the bar of the District, formerly Italian umpire in the Venezuelan Mixed Commissions, and agent of the United States in the celebrated Pious-Fund Case — the first case which was submitted for arbitration to the present Hague Court.

ADDRESS OF MR. JACKSON H. RALSTON,

OF WASHINGTON, D. C.

Mr. President, Ladies, and Gentlemen: I am invited here to-day on, I may say, rather short notice, to say a few words with relation to the subject of the codification of international law. My remarks will cover, perhaps, a rather narrow field, being addressed, as they will be, to the codification of international law in so far as it may relate to matters of claims, rather than to international law as a whole.

That codification is possible of international law as a whole I think can not be doubted. Whether the time has yet arrived for the full and complete performance of that work may be a question; but if the various relations of man and man and between the citizen and the government were capable of codification, and advantageous codification in internal law, may we not believe that the less complicated and the less numerous relations between state and state and states in their various capacities with each other as representative of individual citizens, are capable of this ultimate codification? And the material necessary for it is now, to a large extent, at hand.

In so far as claims are concerned, there is to-day a sufficient wealth of precedent and a sufficient variety of incidents to justify the formation, to a large degree, of the outline — more than the outline — of a code of international law relating to them.

Now, what are some of the subjects to be considered and some of the difficulties to be confronted, and perhaps benefits to be derived? Before there can be any claim, in the fullest sense of the word, made

by one nation upon another there must be antecedent intervention by the nation on behalf of its injured citizen. The law of intervention, it has to be said, is in a most unsatisfactory condition. Each nation to-day is a law unto itself, and the precedent of to-day is not necessarily the precedent for to-morrow.

We have the words of Lord Palmerston, so often quoted, to the effect that while England would not ordinarily interfere on behalf of contract claims, she nevertheless retained the right to do so; her intervention usually being because of a tort committed against a subject.

You have, therefore, an unsatisfactory condition of affairs; each state, as I say, being a law unto itself, and there being no common source of authority to which appeal can be made.

As a primal step, therefore, it would seem to me advantageous that the circumstances under which intervention can be demanded and allowed should be defined, and that the state itself should have a right to say to its citizens that under such and such circumstances they can depend upon an intervention of their government, and that under such other circumstances they have no right — absolutely no right — to ask their government to interfere and present their claims to another state.

On whose behalf should such intervention take place? That question remains unsettled to a degree. We, of course, recognize the right of intervention, circumstances permitting it, on behalf of citizens; but that does not always answer the question. We should also have it established that the right extends not only to citizens but to those who are entitled to the protection of the claimant states. This, it is true, is the ordinary interpretation given to the right of intervention, but it should be fixed.

Is there a right to intervention on behalf of a corporation which has, perhaps, been organized under the laws of the respondent state? There are several cases which answer "Yes." There are others which answer "No." There are equitable considerations entering into the matter affecting the right of intervention.

These questions might all be answered — definitely answered — by means of a code.

Pursuing that branch of the subject further for a moment, under what circumstances can an intervention exist? Should there be a previous denial of justice? What classes of offenses are of such nature as to require the claimant government to have its citizens exhaust local remedies before appealing for international relief? This question is absolutely open, so far as definite, ultimate expressions of opinion are concerned. There are general tendencies, but the last word has not been said. The last word should be said in a definite manner by agreement between states.

But pass, if you will, over the question of intervention. We go, let us suppose, to the formation of a commission which will have in view the determination of whole series of disputes between nations. One of the first matters it will be called upon to determine will be the interpretation of its protocol. Are there fixed canons of interpretation? While there are generally accepted principles, yet to-day the commissioner or umpire who desires to perform his duty and properly interpret the protocol before he comes to act will go back to the old principles laid down by Vattel, rather than rely upon later utterances, excellent as many of them are, to learn the rules of interpretation. But these rules have not a binding sanction, as they would have were the matter properly codified and agreed upon between nations.

Next, the commission may have to consider the rules of evidence. Fortunately, this is an easy matter, so far as the opinions of commissions are concerned. As a rule, they have followed the suggestion that "there are no snakes in Ireland." There are no rules of evidence generally so far as commissions are concerned. Anything is receivable, under the protocols. I speak now as a general rule. But there doubtless are reasons for the establishment of proper rules of evidence or limitations upon the acceptance of evidence.

Questions of conflict of laws arise — whether the law of the demanding nation or whether the law of the responding nation should prevail. There is no fixed authority determining questions of that kind. Such questions arose before the recent Venezuelan commissions, and were, as I hope and as I believe, generally properly decided; but they were decided on general principles and not by reason of any existing fixed, immutable standards.

Questions of citizenship arise before every commission. There is no fixed way to-day to determine questions of double citizenship. The commissions are left without guide.

Questions of the status of married women arise. Commissions are guided as best they can be from the determinations upon the subject given by local tribunals.

Tribunals sometimes receive help from eminent international writers, but upon many of the points of citizenship there are disputes which could very well be removed.

There are questions arising before them continually as to the weight to be given local laws. How far shall they be controlling? Definite answers should be given.

A very interesting question relating to the matter of successions as to personal property came before the recent Venezuelan commissions. The question, in a general way, was whether the rule of many of the European nations, to the effect that succession, or the law of succession, was determined by the nationality of the party, should be adopted, or whether the law of the United States, of England, and of one or two European nations, to the effect that successions were determined by the law of the domicile of the deceased at the time of such decease — which rule should prevail? It was left practically to the fancy — to the judgment — of the individual umpire.

The question came before the American umpires, and they, governed and controlled, undoubtedly, by their early education, decided in favor of the American and English rule. Their decision — correct as we would esteem it from the mode of thought we have, from the education we have received — would undoubtedly be regarded as incorrect by the majority of European publicists. This question should be determined for the control of commissions.

What interest should be allowed, when allowable, on claims, and whether interest should be allowed to all to the date of award, are questions likewise rarely considered in the preparation of protocols, and can be answered only by the particular predilection of the umpire or of the commission.

We may pass to a variety of questions upon which commissions

have decided and may decide in different ways — perhaps substantive international law — which might properly have been solved by a code prepared particularly for commissions.

Let us take the matter of forced loans. Are they internationally legal or illegal? Dr. Lieber decided, in the Mexican-American Commission of 1869, that forced loans were illegal and gave awards where they had been exacted of American citizens. When he retired from the commission, Sir Edward Thornton succeeded him. Sir Edward Thornton decided that forced loans could be collected, and did not — certainly at least under the wording of that particular treaty (the same under which Dr. Lieber had acted) — constitute ground for international claim.

When the same question arose in Venezuela, I think without exception the umpires decided that forced loans could be recovered for; that they did constitute a ground of international reclamation. Such a question should be set at rest finally.

No question received greater consideration in Venezuela than the liability of the state for the acts of unsuccessful revolutionists. The United States, as we know, had denied all liability on her part for the acts of the Confederate government, and has successfully maintained that position. Sir Edward Thornton, in the commission to which I have alluded, took the same position. Other commissions have done the same; and yet there was a very distinct and determined fight upon the subject — a bitter fight, if you will — made before the various commissions in Venezuela. The general tendency of the European commissioners and umpires was to hold Venezuela responsible, on one theory or another, for the acts of unsuccessful revolutionists; even going so far in one or two cases as to hold Venezuela responsible for obligations given by revolutionary generals who had failed of success.

The attitude of the American commissioners was distinctly different, and they held as a matter of right that Venezuela was not responsible for the acts of unsuccessful revolutionists; there being but a slight departure from this position on the part of a single umpire.

Now, the Europeans had strong support for their position. Without discussing their argument, the Institute of International Law,

in undertaking to form a segment of a code upon the subject, had given color to the position taken by European umpires and commissioners — given color wrongfully. It had not, however, said the final word; because its expressions were, after all, only expressions of opinion, and a concrete case or concrete cases were not presented to and discussed by the Institute of International Law.

Again, there are important questions which should receive the attention of the framers of a code relating to the responsibility of states which have inserted in their constitutions or in their contracts or concessions what is known as a "Calvo clause." Those of you who have read, as doubtless many of you have, Professor Moore's recent Digest of International Law will have seen some account of the different views which have been taken by umpires with regard to this question.

There is serious need for a final, definite expression of opinion, formulated in the shape of a code or otherwise, as to the binding character of the so-called "Calvo clause" upon claimant nations, or even under what circumstances it may be binding upon the individual claimants themselves.

Measure of damages is something requiring consideration, and upon which commissions have differed — differed honestly and differed reasonably — but which should receive attention.

In approaching the end of the brief statement I have to make before you to-day I come to the barring of remedies. How far are nations to be held entitled to the benefit of prescription? It has been held many times, notably it was held in the Pious-Fund case, that local laws of prescription were not binding internationally. But although laws of prescription are not binding, ought not the principle of prescription to be recognized? It has been so held several times by commissions — by the commission of which Mr. Little and Mr. Findlay were members, in the readjustment of the disputes which came before the Venezuelan commissions of 1865, and by several of the commissions in Caracas; but there are differences of opinion as to whether and under what circumstances prescription itself may be invoked in favor of a respondent nation.

This is a class of questions particularly to be treated of in an international code relating to claims.

What constitutes nonneutral conduct, by virtue of which a claimant will lose his right to recover before a commission? There has been no satisfactory treatment of this subject.

Then the question comes of interest on awards provided for by the protocol itself or not allowed, as the case may be, but about which commissions have differed.

In several important cases which came up before the recent Venezuelan commissions it was decided by the American commissioners that they were without power to allow interest on the awards they gave. But such has not been the universal rule.

Mr. Chairman, I have reviewed, briefly, some only of the questions which ought to be met and determined by a code. I have touched upon some which are the most important, perhaps, which have offered the most of difficulty in commissions, but there are many others whose importance is only secondary and which ought to be amply covered.

I thank you, Mr. Chairman and gentlemen of the convention.

The CHAIRMAN (Mr. Porter). Gentlemen, I shall now have the very great pleasure of calling upon Mr. Takahashi, professor of international law in the Imperial University of Tokyo, who will speak upon some peculiar things in the recent Russo-Japanese war.

ADDRESS OF MR. S. TAKAHASHI, OF TOKYO, JAPAN

Mr. President, Ladies, and Gentlemen: It is a great honor you confer upon me to be invited to read a paper before the members of this Society, representing as you do the most learned citizens of the United States and the most distinguished men in the science of international law. My subject is "Some peculiar incidents bearing on prize law."

During the Russo-Japanese war many cases were brought before the Japanese prize courts. The number of vessels, arranged according to nationality, is as follows:

Russian, sixteen; all condemned.

British, twenty-two; seventeen condemned and five released by the decisions of prize courts.

German, ten; three released by special favor at the end of the war.
American, five; three condemned and two released by special favor.
Norwegian, four; one condemned, two released by decision, and one released by special favor.
Austro-Hungarian, two; all condemned.
French, two; all condemned.
Dutch, one; condemned.
Swedish, one; released by the decision.
Chinese, one; released by the decision.

The totals are therefore sixty-four vessels captured — fifty condemned, eight released after the decisions of the prize court had been given, and six released by the imperial ordinance issued when the treaty of peace had been concluded.

The reasons for confiscating the vessels are as follows:

Seventeen as "enemy vessels," sixteen of which were Russian, and one vessel under hostile employment.
Nine as the carriers of contraband goods.
One as the carrier of contraband persons.
Four as blockade runners.
Two in unneutral service.
One as a ship assisting the enemy's hostile operations.

The number of cases concerning ships and cargo tried before the prize courts were one hundred and twenty-four, and those tried before the higher prize court were ninety-two. I shall not enter into the explanation of these cases because the details are treated in my forthcoming work, now in the hands of the printer.

Besides the cases above referred to there were very peculiar incidents which have not been brought before the prize court. In these incidents there are many interesting questions worthy of study. The following two cases represent them:

The "Daijin Maru" Incidents. — The *Daijin Maru,* a Japanese vessel, having shipped 2,000 bags of rice and many other articles at Sakai, Japan, sailed on April 25 and was navigating the offing of Kamoi Promontory, Japan, at 2 o'clock p. m. of May 5, when a torpedo destroyer under the Russian naval flag suddenly appeared. Then a rowboat came with about thirty officers and men, who

boarded the *Daijin Maru* to examine her. They took away the ship's license and other necessary articles and took the master, Yabu, and the crew in the Russian boat, leaving Okata, chief sailor, alone with one Russian officer, two petty officers, and a crew of ten. As soon as the boat reached the Russian destroyer it was taken on board, and the destroyer sailed away westward. The Russian crew on the *Daijin Maru* directed Okata to sail west. On May 12 they saw land, but, being prevented by fog, they anchored two miles off land. On the 13th they sailed southward and saw an island which they thought was Askold Island, belonging to Russia, but they did not approach it because it was sunset and they were afraid of touching a mine. They drifted about until the 21st, when they saw a ship going southward. Okata thought the ship to be one of Japan's, but cunningly deceived the Russians, pretending that this ship was a Russian torpedo boat. The Russians were delighted and hoisted the Russian naval flag and signaled with guns and hand flags. Okata took off his overcoat to shake it, and cried for rescue. The ship, on coming nearer, was discovered to be a Japanese ship. The Russians thereupon locked Okata up, but the Japanese ship compelled the Russians to surrender him, threatening, in case of refusal, to ram the ship. The Russians obeyed and Okata, being released, swam to the Japanese ship by aid of a rope and reported that the Russians had no bullet ammunition (though they had rifles and guns). Thereupon the sailors of the Japanese ship boarded the *Daijin Maru* and captured all the Russians and were about to proceed to take the vessel itself, when, unfortunately, the rope broke, and the captured vessel being in the service of the Japanese Government, she could not longer delay. So, leaving the *Daijin Maru,* she arrived at Gensan at 4 o'clock a. m. of the 22d. The ship that rescued Okata and captured the Russians was a private vessel named the *Toto Maru,* owned by the Nippon-Shosen-Kaisha.

The *Daijin Maru,* after being abandoned by the *Toto Maru,* drifted about, but later, under the escort of another Japanese vessel, she was taken back to Gensan. The ship's cargo had not received any damage when she was abandoned, but it is said that both cargo and instruments were missing when the ship was finally found. These are the details of the *Daijin Maru* incident.

It is a common practice to place a captured vessel in charge of a prize crew, to bring her into the port of adjudication, and it is not unusual to meet with some accidents on the way to that port. For instance, a drunken officer having neglected to superintend the captured crew and the ship running aground, there arose a question as to who was responsible, the prize officer or the captain; it was decided against the officer. The *Daijin Maru* was a case of a vessel being recaptured by one of the Japanese ships. But the ship which recovered the *Daijin Maru* was no more than a common merchant vessel which had no right to make a capture, so that the *Daijin Maru* can not be said to be recaptured. Then, must the *Daijin Maru* be still deemed as a Russian prize? The answer must be in the negative, for the prize crew who occupied the vessel were all captured and the vessel was taken out of the Russians' hands. Again, she is abandoned by the ship that rescued her. Legally speaking, what is the status of such a ship? Suppose that it was again captured by a Russian war ship, just after the boat was abandoned. In such a case which is it more correct to say, that this ship was captured twice, or that this ship was continuing in the captured condition since she had been captured in Kamoi? The *Toto Maru,* being a merchant vessel, had no right to capture her and went away leaving the *Daijin Maru.* How does this action cancel the Russian war ship's right of capture obtained at Kamoi? These points must be considered carefully. Yet, it must be observed that the Russians had lost their right in the *Daijin Maru,* because she was left with none on board and the Russian crew were taken prisoners when she was abandoned.

The Japanese Government considered it a case which did not come under the adjudication of a prize court. This is evident, because the *Daijin Maru* was not captured by a Japanese war ship. In the end the ship was returned to her original owners and there was no question of salvage in connection with her return.

I shall recite another incident.

The "Independent" Affair. — The *Independent,* a chartered vessel of the Osaka-Shosen-Kaisha, loaded with rice, saki, wine, and other articles, and destined to Newchwang, entered Chefoo, where the Chinese custom officers treated these articles as contraband goods

and demanded that they be landed. The Japanese consul, Mizuno, lodged a protest and on the 30th of August, 1904, he dispatched a letter to Mr. Uchida, the Japanese minister to Peking, in the following sense:

The *Independent,* a chartered vessel of the Osaka-Shosen-Kaisha, destined to Newchwang and loaded with rice, saki, money, and other contraband goods, entered Chefoo on the 30th and was commanded to land her cargo by the Chefoo customs. I asked the reason for this of the chief of customs and was answered that there were instructions not to allow the passing of contraband goods from neutral ports (as Hongkong) to belligerent territories, and of course it must be treated as if it were sent from a belligerent country. Finally, it was agreed to ask the commissioner for instruction and not to interfere with her cargo until the arrival of a telegram bearing instructions.

On the morning of September 1, Baron Komura received a telegram from Minister Uchida that Wai-wu-poo promised him to dispatch on the following day instructions, through the commissioner to the taotai and president of the customs, and to allow the departure of the *Independent.* Next day a telegram came from Consul Mizuno with the information that the *Independent* had departed for Yingkow without objection.

In concluding the statement of this incident some words will be added. It is rather a regrettable fact that Chinese provincial authorities often misunderstand the principles of international law, and without making further study carry out what they think to be the principles of international law.

As you know, it is insisted in modern international law that even in time of war the individuals of both belligerents can continue their commercial transactions.

Recently, in the *Tatsu Maru* incident, the Chinese provincial authorities again carried out what they deemed to be international law, and after the incident had been settled the Kuwang-tong people intended to resort to their accustomed method of boycott against Japanese merchants.

Judging from this point of view, the Kuwang-tong people seem to confuse the private matters of the people with political and diplo-

matical matters between states, and wish to revenge themselves on Japanese people for what the Japanese authorities and the Chinese authorities have agreed upon.

These are but about one-tenth of the novel and peculiar incidents relating to prize law. There are also many questions, such as those of claims for damages, questions concerning the nature of vessels which are exempt from capture at the commencement of war, questions of salvage concerning captured vessels, the question concerning a boat brought on board another vessel and put in dry dock in Japanese territory before the war, etc. To explain all of them would take several hours, and I refrain from doing so. I thank you for your very kind attention.

The CHAIRMAN (Mr. Porter). Gentlemen, this is an interesting subject, to which we have listened with much pleasure and instruction from the several gentlemen who have been kind enough to deliver addresses and read papers to us this morning, and these papers will go into our archives and be of exceeding value. They are now open for discussion. Are there any remarks to be made upon the interesting subject to which we have listened this morning, and which has been the topic of this meeting?

The Chair hears no desire from anyone to enter further into this discussion. It will now be in order to proceed to the annual election of officers.

BUSINESS MEETING

The CHAIRMAN (Mr. Porter). What is your pleasure, gentlemen, in regard to conducting this election? We will now ask the Committee on Nominations to give their report.

Mr. BARROWS, of New York City. Mr. Chairman, there is a popular idea that it takes a long time in Washington to make up a political slate. Perhaps the action of this committee will dispel that notion. About twenty-four minutes after the committee met they had substantially agreed upon a list of officers, and I do not think it could be any better if they had taken twenty-four hours; but there

was an opportunity given some of the gentlemen named to accept, and so we have been able to secure the acceptance of some of the gentlemen whose names were in doubt. We have not felt any difficulty about coping with the problem of a third term, so far as our President is concerned, and it is a gratifying matter that not only the President but other members we have named, such as Hon. John Sharp Williams and Senator Cullom, consider it entirely consistent with their public duties to be connected with this Society and help guide its policy along the pathways, sometimes devious, of international law.

I will read the names of the officers. I will say that this committee does not nominate the officers of the Executive Committee nor the Secretary and Treasurer; they are nominated by the Executive Council.

The officers we have nominated are:

President

Hon. Elihu Root

Vice-Presidents

Chief Justice Fuller
Justice David J. Brewer
Justice William R. Day
Hon. William H. Taft
Hon. Andrew Carnegie
Hon. Joseph H. Choate
Hon. John W. Foster
Hon. George Gray
Hon. John W. Griggs
Hon. W. W. Morrow
Hon. Richard Olney
Gen. Horace Porter
Hon. Oscar S. Straus.

You will notice that the names of some of these gentlemen possibly may be nominated to other positions in the course of a year, but that will not interfere, we trust, with their relations to this Society.

Then as to the Executive Council. We are to nominate an Execu-

tive Council for 1911. Mr. Cousins felt obliged to resign. John Sharp Williams has been substituted. We have also used the names of Rear-Admiral Charles H. Stockton, United States Navy, and General George B. Davis, United States Army.

The names which the committee proposes are as follows:

Hon. Richard Bartholdt, Missouri
Prof. Charles Noble Gregory, Iowa
Hon. P. C. Knox, Pennsylvania
Hon. John Sharp Williams, Mississippi
Admiral Charles H. Stockton, District of Columbia
Gen. George B. Davis, District of Columbia
Charles B. Warren, Esq., Michigan
Prof. Theodore S. Woolsey, Connecticut

We are also to fill a vacancy caused by the resignation of Hon. Andrew D. White of the Council elected to serve until 1910. We have substituted the name of Hon. Shelby M. Cullom, Chairman of the Committee on Foreign Relations of the United States Senate.

The report is respectfully submitted.

The CHAIRMAN (Mr. Porter). What is your pleasure as to the mode of electing the officers thus nominated?

Mr. CHARLES N. GREGORY, of Iowa City, Iowa. I move that the Secretary cast one vote for the Society for the ticket so happily selected by our excellent machinery, the Nominating Committee.

[The motion was seconded and carried.]

The CHAIRMAN (Mr. Porter). The Secretary is so directed.

Secretary SCOTT. As the result of the vote, the Secretary has cast a ballot for the entire ticket as proposed — not by the machinery, but by the members of the American Society of International Law.

The CHAIRMAN (Mr. Porter). The ballot has been cast, and the officers are duly elected.

Now, we shall proceed to the election of an honorary member. You know by our Constitution we are authorized to elect an honorary member each year. We will now proceed to that election, and shall be glad to hear the nomination made by this committee.

Mr. GEORGE G. WILSON, of Providence, R. I. The Committee on Nominations have reported to the Executive Council, and with the approval and in behalf of the Executive Council, now present for honorary membership in this Society the name of Louis Renault, a member of the First Peace Conference, a member of the Conference for the Revision of the Geneva Convention, a member of the Second Peace Conference, professor of law in Paris and also professor in the Free School of Political Sciences in Paris, a distinguished writer and author, and a friend of many who are pursuing the work of international law, and a beloved teacher. As you all know, he received one-half of the Nobel Peace Prize.

We already have honorary members from England and from Austria, but none of those would take precedence over the name of Louis Renault, which we now submit.

Mr. ELLERY C. STOWELL, of Washington, D. C. I second the nomination.

[The nomination was unanimously carried.]

The CHAIRMAN (Mr. Porter). Louis Renault is unanimously elected, and I congratulate the Society upon having as an honorary member this very distinguished gentleman.

Mr. CHARLES H. BUTLER, of Washington, D. C. I would like to offer three resolutions, which I shall ask the Secretary to read.

The Secretary read as follows:

Resolved: That the papers and proceedings of this meeting relative to the topic of discussion, "Should the violation of treaties be made a Federal offense," be and hereby are referred to a special committee of five, with power to add to its numbers, to be appointed by the President, and that such committee report at the next annual meeting of the Society.

Resolved: That the papers and proceedings of this meeting relative to the topic of discussion, "The codification of international law: Its desirability and its progress," be and hereby are referred to a special committee of five, with power to add to its numbers, to be appointed by the President, and that such committee report at the next annual meeting of the Society.

Resolved: That the special committees appointed at this meeting be requested to place their reports in the hands of the Secretary prior

to the first day of January, 1909, and that as soon as possible after that date the reports be transmitted to the members of the Society, and that the Treasurer be authorized to pay for the printing and circulation of such reports.

The CHAIRMAN (Mr. Porter). You have heard the resolutions. What is your pleasure in regard to them?

A MEMBER. I move that they be referred to the Executive Council, with power to act.

[The motion was seconded and carried.]

The CHAIRMAN (Mr. Porter). Now, gentlemen, before we adjourn to meet here this afternoon at half-past two for the afternoon session, in which, as you will see by the program, the topic will be "The organization, jurisdiction, and procedure of an international court of prize," let me say a word with reference to the JOURNAL OF INTERNATIONAL LAW. Perhaps no periodical has made such progress in so short a time. Our membership has run up almost to a thousand, and we think we will increase rapidly in the future; the circulation of the JOURNAL has extended in all directions, and it has become the *vade mecum* of the diplomats in all quarters; it is attracting very much attention. In order to make a strong publication we ought to have an extra fund for this year, which will do very much good — very great good. There has, therefore, been prepared a subscription paper. This will state the action [reading from paper]:

The Executive Committee of the American Society of International Law desire to continue the publication of the JOURNAL at the present standard of form and quality, and respectfully invite subscriptions to a special publication fund to be devoted solely to the purpose aforesaid.

A subscription paper has been written out, and a number of names have been put down. I am glad to see that it contains quite a list of subscriptions, the lowest amount being $10, some $25, some $50, and some $100. This subscription paper will be placed upon this table at the right, and we hope that every member will contribute something toward this very important fund.

Now, the only other notice to be given, I believe, is in regard to the banquet tickets. They can be procured in the room just across

the way, and everyone who intends to be present at the banquet is requested to procure his tickets as soon as possible. The Secretary informs me that there are already one hundred and thirty-eight acceptances, so that we shall have a very large and respectable banquet to-night.

The Chair knows of no other business to be considered before we take a recess.

[At 12 noon a recess was taken until 2.30 p. m.]

AFTERNOON SESSION

Saturday, April 25, 1908

The Society reassembled at 2.30 o'clock p. m., Prof. George G. Wilson in the chair.

The CHAIRMAN. The topic for this afternoon is, "The organization, jurisdiction, and procedure of an international court of prize." The Secretary, seeing that I have gotten into the habit of being upon the platform, asks me to stay for the afternoon. As the first speaker on this subject, I have the pleasure of introducing Mr. Justice Brown, formerly of the Supreme Court of the United States.

ADDRESS OF MR. HENRY B. BROWN, OF WASHINGTON, D. C.

I regret my absence from the meeting of the Association last evening, as I see by the morning's papers that the discussion included within its scope the question of an international prize court, and I have no doubt that from that discussion I would have received much enlightenment and perhaps suggestions for the reframing or amendment of what I have to say, but not having had that pleasure, I am remitted to the address as I have written it.

Had the Second Hague Conference done nothing more than adopt the convention for the establishment of an International Prize Court, it would have sufficiently justified its being called together and refuted the criticisms of those who, because it did not accomplish all its most enthusiastic supporters desired, have sought to belittle its results. It marks an important step forward in the adjustment of international differences. It provides for the first time, so far as I know, for the compulsory arbitration of certain questions, though of a limited class, and establishes a court which shall have a superior jurisdiction over the courts of the signatory powers.

The convention is not only significant in this particular, but because of its potentiality in the possible creation of other courts

of more enlarged powers, which may ultimately go far toward the peaceful settlement of all international disputes which do not involve the integrity of the territory or the vital interests or honor of the particular powers. These are generally admitted to be beyond the scope of arbitration.

This convention was the outcome of two propositions — one by the German delegation for the establishment of a high international court of prizes, and the other by the British delegation for a permanent court of international appeals. Both these delegations agreed, and indeed it was the opinion of the entire conference, that there was a clear distinction between land and sea operations, in the fact that the former are carried on against the enemy alone, and require no judicial authorization; while the latter, dealing as they do with the property of neutrals who are alleged to have violated their neutrality, require a judicial determination both of the question of violation and of the fact of neutral ownership. It is only by such determination that diplomatic reclamations can be avoided. Necessarily, these proceedings must be carried on in a court of the belligerent captor. No captor could be expected to send his prize to a port of the country to which she belonged, for condemnation, since every objection made to the partiality of the one would be equally applicable to the other. Hence, from time immemorial, the courts of the capturing power have asserted the jurisdiction of determining the validity of the capture. While no suspicion may attach to the integrity or impartiality of these courts, their judgments are largely governed by the local law, which in this respect may differ from the international law. That the national courts should differ among themselves with respect to the rights of neutrals is no more than would naturally be expected from the fact that one court may belong to a strong naval state, interested in enlarging belligerent powers, while another may belong to a neutral state, enjoying a large trade with the belligerents. If any court dealing with prize cases can be suspected of partiality, it would naturally be that of the belligerent captor, since to the ordinary motives which bias the opinions of even the best of men are added those of patriotism and a desire to encourage that arm of the government which is engaged in fighting its battles. Under such circumstances it is not strange that complaints

are sometimes made that their judgments do not conform to international law, or that the courts lean unduly towards sustaining a capture made by persons acting in good faith, but in ignorance of all the facts. They certainly can not be expected to have much sympathy for, or to properly appreciate the legal rights of, those who are seeking to take advantage of the misfortunes of their country to carry on an illicit but profitable trade. With a view, then, of obtaining a court which, by its dignity, the number, learning, and impartiality of its judges, should command the confidence not only of the belligerents and of neutral maritime powers, but of the whole civilized world, the conference adopted the convention for the establishment of an international court.

We are confronted upon the threshold of the convention with the power of the President and the Senate under the Constitution to assent to the creation of a foreign court, with jurisdiction over the courts created by Congress, and even over the Supreme Court of the United States. The appeal is given as a matter of right from the prize court of the belligerent captor, and may be based upon the ground that the judgment was wrong, either in fact or in law. The prize court from which the appeal may be taken is not named, but a further article provides that it may be taken after judgment in the court of first instance, or only after an appeal, as the municipal law of the belligerent captor may decide. To prevent unnecessary delay in the disposition of cases in the national courts, it is provided that but one appeal shall lie from the original judgment, and that, if the national courts shall fail to give final judgment within two years from the date of the capture, the case may be carried directly to the International Court. As, under the laws of Congress, resort may be had to the Supreme Court of the United States, which, though not a foreign court, is a court acting under a different sovereignty, only from the final decree of a State court of last resort, I think we may assume that by analogy Congress would require that parties exhaust their remedies in the local courts before resorting to an appeal to the International Court. This would limit the appeal to the final decrees of the Supreme Court, except in cases where no appeal lies to that court under Revised Statutes, section 695.

But the question still remains as to the power of the Senate, or of

Congress, to provide for a review of cases adjudicated in the Supreme Court of the United States — a court created by the Constitution, whose original jurisdiction, at least, is fixed by the same instrument. Congress has provided for an appeal to that court, with certain limitations, from all inferior Federal courts, and, with certain other limitations, from the highest courts of the several States. But no power is given to review a decision of the Supreme Court, and I know of no method by which this can be done. But the power to review given to the International Prize Court implies the power to reverse, and the Supreme Court of the United States, while much given to reversing the decrees of inferior courts, and occasionally even itself, is so little accustomed to being reversed that as a private citizen I would not undertake to say what answer that court would make to an application to transmit its record to the International Bureau, which seems to be a kind of clerk's or registrar's office. I have no doubt the application would be given respectful consideration. One may hope in the interests of humanity that the court may see its way clear to granting it. There is nothing in the Constitution prohibiting it, and it is quite possible that under its general power over the jurisdiction and procedure of its courts, and to provide for the general welfare, Congress may, so far as it can act upon the subject at all, waive so much of its sovereignty as to allow an appeal from its own to an international court. One can not be familiar with the practice of the Supreme Court without recognizing the impossibility of one member speaking for all; but we may rest assured that its decisions will be given in the spirit of justice and amity to other nations, as well as in consonance with the letter of the Constitution.

This appeal is by no means a general one, but is limited to judgments affecting the property of a neutral power or individual, or affecting enemy property, and relating to cargo on board a neutral ship, or an enemy ship captured in neutral territorial waters, or in violation of some convention in force between the belligerent powers, or of the laws of the belligerent captor. Although the appeal must in general be taken by a neutral power or individual, in the latter class of cases it may be taken by a subject or citizen of an enemy power.

Limited as this jurisdiction is in respect to persons and property, it extends to a great variety of possible subjects. Indeed, there is scarcely a question connected with the rights of neutrals in time of war that may not be brought before the court for adjudication. The convention requires the appointment of fifteen judges of known proficiency as jurists in questions of international maritime law, and of the highest moral reputation, nine of whom are necessary to constitute a quorum, or seven if the judges are less than eleven. A majority of these must almost necessarily be neutrals, though by article 15 judges from certain contracting powers — viz, Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia — are always summoned to sit, and by article 18 the belligerent captor and the neutral is each entitled to appoint a naval officer to sit as assessor, but with no voice in the decision. These judges are appointed for six years, with power of reappointment. There is also a provision that if a belligerent power has no regular judge upon the court it may ask that a judge appointed by itself may take part in the settlement of all cases arising from the war. The limitation of judges to jurists of known proficiency in international maritime law was doubtless intended to forestall the appointment of men, however high their rank, who are distinguished only as diplomatists or politicians.

While the classes of cases with which the court may deal are not specifically enumerated, they may be said in general to embrace all those in which the rights of neutrals or the sanctity of their territory has been directly or indirectly invaded, as well as the single case where a capture has taken place in violation of a treaty between the belligerent powers, or of a statute of the belligerent captor. It may involve the right to make a capture before a declaration of war or notification of hostilities, a question formerly much mooted, but now apparently set at rest by the third convention, which recognizes that hostilities should not commence without notice, either in the form of a declaration of war or of an ultimatum in the nature of such declaration; the definition of the words "contraband of war," perfectly well settled in its general principles, but uncertain in its applicability to materials and machinery for the manufacture of arms and munitions of war, and particularly to coal, horses, provi-

sions, and certain other articles the contraband character of which is dependent upon the question whether they are destined for the use of the belligerent army or the support of a peaceful people; the right of blockade, by whom it may be asserted, how it should be notified to neutral nations, and the extent to which it must be made effective, as well as the acts necessary to constitute a breach, and how far the right of capture applies to vessels bound immediately to a neutral and ultimately to a blockaded port, or what is known as the doctrine of continuous voyages; how far the right to issue letters of marque has been retained; the immunity of hospital and cartel ships, mail steamers, fishing vessels (recently held immune in the *Paquette Habana*); the rights of neutral commerce, and the principle of free ships, free goods, as well as the question of due diligence in preventing the equipment of war vessels in neutral ports, so exhaustively considered by the Geneva Tribunal. The immunity of all private property at sea, so earnestly pressed by the American representatives at The Hague, and so ably opposed by Captain Mahan, can hardly be said to have become a judicial question, since I know of no maritime power which has granted such immunity to enemy's property, though more than one has professed a willingness to unite with other nations in a convention to that effect. However favorable the proposed court might be to the principle of immunity, it is after all but a judicial body and, like any other court, bound to decide according to the accepted principles of international law, with no further legislative power than every court has to adopt a reasonable construction where the law is unsettled, or the judgments of the national courts are conflicting.

In accordance with this familiar principle, the convention provides, in article 7, that if the question of law to be decided is covered by a treaty between the captor and the neutral power interested the court is governed by the provisions of that treaty; that in the absence of such provisions, the court shall apply the principles of international law; and if no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity. This is analogous to the rulings of our own courts in cases of international collisions, where if both vessels are sailing under the same flag, or under different flags having the same laws, the law of

the flag is administered; but if sailing under different flags and different laws, the law of the forum is administered *ex necessitate,* since it would be obviously unfair to prefer the law of one flag to that of the other. These provisions as to the law to be applied also extend to the order and mode of proof. Whether the burden of proof be upon the belligerent captor to establish the regularity of the capture, or upon the neutral to prove its illegality, and in what manner these proofs shall be made, are left to be determined by the local courts, with the proviso that the court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor when it is of opinion that the consequences of complying therewith are unjust and inequitable. If the court pronounces the capture to be valid, the property shall be disposed of in accordance with the law of the belligerent captor. If it pronounces it to be null, the court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damage.

In this connection a possible complication may arise in the insistence of particular nations, before ratification takes place, upon the observance of certain familiar principles of the local law, in cases in which their own vessels are concerned. These would operate as modifications or amendments of the original convention, and if insisted upon by many of the powers might become so numerous as to prove its impracticability, and wreck the whole system. If the local law of the belligerent captor were to be applied in determining the validity of the capture in each instance, nothing would be left to the International Court except the question of compliance with that law in the particular case; when, in fact, the main object of the International Court is not to apply the local law, but the principles of the law of nations, and in the absence of any provisions covering the case the general principles of justice and equity. As this is the first attempt to establish a general international court having jurisdiction not of a particular case agreed upon beforehand, but of all cases of a particular class, its success will be watched with great interest, though it may be many years before a naval war upon a large scale will call its jurisdiction into active exercise. The longer its powers are suffered to remain dormant the better it will be for the peace of the world.

That any system of international courts will ever be devised which will bring about an era of universal peace is probably, to use a phrase current in politics many years ago, an "iridescent dream." The combative instinct is too deeply implanted in the human breast to be repressed by an umpire that has not a physical power strong enough to enforce its decrees against all opposition. Courts of law and the police are able to control this instinct among individuals, but in all bodies of men where each individual is free to speak his mind the *gaudium certaminis,* the desire to stir up strife for its own sake, or to obtain a notoriety for leadership, is often so strong as to subordinate the real business for which the body is assembled and throw it into confusion. This trait is as prominent among nations as among individuals. Large armies are maintained and battleships built as guaranties of peace, but their very existence is provocative of war, and the temptation to use them to demonstrate their efficiency is often stronger than the original intent to employ them only to repel an unjustifiable attack.

There is much force in the suggestion, so often made of late, that the best guaranty of peace is the increasing destructiveness of war. There is probably no branch of human industry in which greater changes have taken place during the past century than in the art of war. The modern ironclad bears no greater resemblance to the ancient frigate than an automobile of to-day to the one-horse "shay" of our great-grandfathers, while the superior range and rapidity of firing of modern rifles and breach-loading guns over the flintlock muskets and smooth-bored cannon of the Napoleonic wars has completely revolutionized the conduct of campaigns and the order of battle. The enormously increased expense of warlike equipments is also an argument making strongly for the preservation of peace. When it is considered that the cost of a first-class battleship is about ten million dollars, and that of maintaining and navigating it nearly one million per year; that the cost of a single coast-defense gun, which will sink a ship at a distance of twelve or fifteen miles, is not less than seventy thousand dollars; that the cost of firing it is about one thousand, and that its life is limited to less than a hundred discharges, when it has to be largely reconstructed, it is evident that there must be a corresponding increase in taxation, or that this

country, with all its immense wealth, will find itself outclassed in a naval engagement.

Wars, which were formerly carried on only upon land or sea, are gradually establishing for themselves a new theater of operation in the air. Much of the inventive genius of the past ten years has been expended in devising balloons and flying machines designed for use in time of war; and the nations of Europe, always alert to detect signs of a possible invasion, are watching these new birds of prey with apprehension as to their future development. The fourteenth convention, or rather declaration, of the Hague conference has made a special provision against the launching of projectiles and explosives from balloons and aërial machines.

But it is not alone in equipment that modern warfare has made such remarkable progress. Owing to the assistance received from railways, armies which required months to mobilize and march to the front are now gathered together, despatched by rail in as many days, and hurled against the opposing force in a sharp and decisive series of engagements. In short, a war of thirty years, or even of seven years, is now an impossibility. Defeat, too, is often so much more serious that no time is given for recuperation, and the fate of nations may be decided in the first general battle. Under such circumstances, and with such numerous possibilities, wars are undertaken with great reluctance, and a matter which would have been considered a *casus belli* a century ago is now treated as a proper subject for arbitration. It is safe to say that the beauty of a modern Helen will never be the occasion of another ten years' war. If the progress made in the art of war and the equipment of armies during the last half century be continued for another, it is easy to imagine the result in the total annihilation of one or possibly both of the opposing forces — a contingency which no nation, however belligerent, would care to face, except in a last effort to save its own existence.

Fortunately, the moral progress of the world during the past century contains in itself an assurance that a war will not be undertaken without a substantial cause, and until every effort of diplomacy has been exhausted to avert it. As individuals advance in civilization and refinement, they are less likely to resort to violent methods

to redress real or fancied wrongs. As with individuals, so with nations. In the face of much discouragement and disappointment at the result of legislation, which sometimes has a directly contrary effect from that intended, or raises up new evils as serious as those it is designed to suppress, no intelligent man can review the history of the nineteenth century without being convinced of a substantial progress in the tone of political action and public sentiment, and a gradual elevation of the race, which must redound to the general peace of the world.

The slave trade and slavery itself has been abolished; lotteries and public gambling houses suppressed; the rights of women enlarged; the sale of intoxicating liquors largely restricted; the right of suffrage extended even beyond the limits of prudence; the spoils system, which began with the Administration of Jackson and continued with ever-increasing effrontery to the close of Johnson's, finally became abashed at its own audacity, and a reform set in which bids fair to exterminate the whole system and establish the saner policy which prevailed in the earlier days of the Republic. The same tendency is not less manifest abroad. Germany and Italy have been unified, and Japan raised from what, in the schoolbooks of our boyhood, was described as a semi-barbarous people to a civilized and powerful State. The hardships of war have been greatly ameliorated by more humane methods in the care of the wounded, and by the ninth convention of the Hague conference forbidding the bombardment of undefended harbors, villages, towns, or buildings.

The policy of arbitration which seems to have obtained to a very limited extent among Grecian States, and to have been much discussed by publicists during the seventeenth and eighteenth centuries, took definite shape in the nineteenth, and was erected into an international policy by the Geneva Convention. Since then resort has been had to it with increasing frequency, and a permanent tribunal established at The Hague, to which all nations are invited to submit their disputes. It is now proposed to extend their scope by creating a court with compulsory jurisdiction of certain causes arising in time of war. If the convention establishing this court meets with the general acceptance of the powers, and the court should prove equal to the emergencies of the next great naval war, we may

reasonably look forward to an extension of the same system to international claims for pecuniary damages, the adjustment of disputed boundary lines, as in the San Juan case, the rights of fishery in territorial waters, the interpretation and application of treaties, the forfeiture of concessions or franchises, and in general to all such *bona fide* controversies as are solvable between individuals in a court of law or equity. As there are among individuals certain personal or family dissensions involving the respective standing or honor of the parties, which can not be settled by the courts, there will probably always arise as between nations certain questions which can only be settled by the arbitrament of the sword. Where there is a predetermination to fight, as in the Franco-Prussian war, a slight pretext is sufficient, and no court can possibly prevent it by peaceful methods.

Our own experience in international arbitrations has been such as to encourage the belief that they will in time supersede the necessity, except in a limited class of cases, of resorting to coercive measures for the redress of international grievances. True, victory has not always perched upon our flag. Nor can this be expected in any form of enforcing a litigious right. But while we may think that in a particular case their conclusion may be erroneous, I have never known a serious charge of incapacity, corruption, or partiality to attach to their action.

Prior to the Civil War most of our disputes were with Great Britain, and concerned the long boundary line between the Bay of Fundy on the Atlantic and the Straits of Georgia on the Pacific Ocean. Some of these were adjusted by commissioners appointed by the two Powers, sometimes with a third commissioner as umpire, and once, at least, by the arbitration of a foreign potentate. The first, decided in 1798, turned upon the identification of the St. Croix River, constituting a part of the boundary line under the original treaty of 1783, and was settled by three commissioners, one appointed by each party, and the third an American chosen by the other two. The line seems to have been fixed by unanimous decision according to the British contention. A further dispute arose in 1817, regarding the islands in the Bay of Passamaquoddy, and

was referred to two commissioners, one from each Power, and a compromise judgment rendered.

The northeast boundary between the State of Maine and the British possessions was the subject of two arbitrations, the first of which, submitted to two commissioners — one from each Power — resulted in a disagreement in 1821, and a second covering the same subject was referred to the King of the Netherlands, who made an award which was subsequently waived by both parties and the line established by a new treaty.

Of two arbitrations arising in the settlement of the boundary line through the Great Lakes, one was determined in 1822 by the award of two commissioners, and in the other, the commissioners disagreeing, the matter was finally adjusted and incorporated into the Ashburton Treaty of 1842.

The northwestern boundary between British Columbia and the present State of Washington was not less fertile of disputes. The line east of the Rocky Mountains had been fixed in 1818 by convention at the forty-ninth parallel of north latitude; but from that time until 1846 the line west of the Rocky Mountains was contested in a series of negotiations which at one time threatened a war between the two countries, but finally, by treaty of 1846, the forty-ninth parallel was extended to the middle of the channel between the continent and Vancouver Island. But certain islands in this channel — notably that of San Juan — still remained in dispute, and were at one time jointly occupied by British and American troops. Finally, by the treaty of 1871, the matter was referred to the Emperor of Germany, as arbitrator, who made an award in favor of the United States.

The Geneva Convention of 1872 was the beginning of a new era in the history of international arbitration. Whether we consider the dignity of the two Powers interested, the gravity of the questions involved, the learning and eminence of the members of the convention, the interest displayed in its deliberations by the great powers of Europe, as well as the ability of counsel upon both sides, we can not avoid the conclusion that this was the greatest judicial tribunal of modern times. The foundation of this convention was laid in the treaty of 1871, whereby by Article I it was agreed that five

arbitrators be appointed — two by the Powers interested, one by the King of Italy, one by the President of the Swiss Confederation, and one by the Emperor of Brazil — who should consider the question whether due diligence had been used in preventing the fitting out of Confederate vessels within British jurisdiction, and also of preventing the departure from such jurisdiction of any vessel intended to carry on war against the United States. The decision of this tribunal, holding that due diligence had not been used, and awarding a gross sum of $15,500,000, was a matter of great historical importance. The agreement upon this convention probably averted a war with the mother country.

But we are less concerned with these so-called *Alabama* claims than with the claims of British subjects against the United States, and the counterclaims of citizens of the United States against Great Britain, distinct from the *Alabama* claims. The British claims were of three classes:

1. For injuries inflicted by the Confederacy or its citizens;
2. Claims growing out of captures by United States cruisers;
3. Claims for arbitrary arrests, compulsory military service, and other alleged violations of the personal rights of British subjects.

These claims were, under Articles XII to XVII of the treaty of 1871, referred to three commissioners — one by each Power, and one to be appointed by the President and Her Britannic Majesty acting jointly. Count Corti, the Italian Minister at Washington, was agreed upon as the third commissioner.

Under the provisions of the treaty, four hundred and seventy-eight British and nineteen American claims were laid before the commission. The British claims, with interest, amounted to $96,000,000, and the American claims to less than $1,000,000, all of which latter were rejected. One hundred and eighty-one British claims were allowed, at less than $2,000,000 — a liberal deduction from the original amount claimed.

Many of these claims had been adjudicated by the prize courts of this country, and in a great majority of these cases the ultimate decision of the Supreme Court was sustained by the commissioners, although in three cases, *The Hiawatha* (2 Black 635), *The Circassian* (2 Wall. 135), in both of which there had been a strong

dissenting opinion by Mr. Justice Nelson, his view was adopted, and in the third case, *The Sir William Peele* (5 Wall. 517), the commissioners disagreed with the Supreme Court upon a subordinate point.

Many of these controversies with Great Britain turned upon questions of territorial rights, the respective duties of belligerents and neutrals in time of war; and had either country been less conciliatory in its spirit these controversies might have led into an open rupture. As it was, there were several occasions in which it seemed as though war was inevitable. But the good sense of the Anglo-Saxon race finally asserted its supremacy and saved the two countries, as it undoubtedly will many times in the future, from an armed conflict.

The results, as well as the arguments by which they were reached, confirm the impression that while there is nothing to impugn the good faith or partiality of the local courts, exact justice is more likely to be attained by a court of nine members, most of whom are neutrals, having no interests either of national pride or patriotism to deflect their judgments in favor of one party or the other. Great reforms are usually of slow growth, but if the wish for peace be once conceded the obstacles in the way of securing it will, in the gradual and progressive enlightenment of the race, ultimately disappear. Indeed, a frank recognition of the evils of an existing system is itself a long step towards their amendment.

We shall all welcome the International Prize Court as an important factor in the maintenance of a general peace.

ADDRESS OF MR. HARRINGTON PUTNAM, OF NEW YORK CITY

Mr. Chairman, and Gentlemen: Before referring to the subject of this afternoon, I wish to allude to a remarkable passage in the paper read this afternoon by Dr. Takahashi. He summarized the results of all the seizures during the Russian and Japanese war, and you will recall that he mentioned many instances where the vessels were voluntarily released by the order and grace of the Crown.

This is to be regarded as an illustration of the waiving of technicalities and the granting of relief by a recognition of the higher law that is in accordance with what justice and equity require. My recollection of the prize cases arising from the war between the United States and Spain is that our Government did not grant such a release of vessels after the prize proceedings had been instituted, notwithstanding the fact that in many of those cases the law and the fact were in such doubt that the ultimate decision of the Supreme Court was divided. This liberal action by Japan is an instance of the progress of enlightenment in dealing with the captures of neutral property.

With regard to the prize court to be organized at The Hague, it will not only exercise the appellate jurisdiction laid out for it, but it will undoubtedly exert a wide influence on the local national courts. Heretofore no nation has ever expected that its dealings with the prize law will be subject to review elsewhere. It would at once call upon the courts of the belligerent country carefully to consider their action and the grounds that they may assign for the sentence. Gouverneur Morris, returning from the Constitutional Convention of 1787, was asked what he thought of the Constitution, and he replied: "It will all depend on the way it is administered." I observe that Justice Brown, in the paper he has just read, has suggested the difficulties if certain powers insist too strongly on the definition of principles and doctrines before giving their adhesion to the treaty creating the court. Yet it is certain that no great maritime power would feel itself safe to consent to the organization of this court without having certain accepted principles clearly defined and stated. We have the example of the Washington Treaty, in which Great Britain wisely insisted upon the standards of due diligence by neutrals being defined before it agreed to the Geneva arbitration.

The preponderance of England as to the rights of neutrals arises not only from the influence of its own subjects and the vessels under the British flag, but also from the view-point of marine insurance. During the last twenty years London has grown to be the world's insurance market, so that the ultimate losses by condemnation of merchant ships and cargo are borne by the British insurers. Hence

their wish (which other powers must recognize as reasonable) to have the limits of neutral trade and the question of what are contraband clearly defined. It is to be hoped, however, that those principles may be soon cleared up and stated, and that the statement will be so moderate and of such general acceptation that the maritime powers will readily reach an agreement.

I also hope that in the growth of this prize court something further may come. We have a borderland of jurisdiction over naval vessels that it is almost as difficult for one country to exercise satisfactorily as in the cases of capture and prize, and that is in regard to the collisions of vessels of war in time of war. We are all well aware of the fact that naval vessels are in the habit of running without lights and without fog signals, if the conditions of warfare require it. This, however, they may also do in times of peace, and if they should thus run down and sink an innocent vessel there is little doubt that the government responsible for such neglect to observe the rules of the road would be answerable in damages. However, if this occurred in the immediate theater of war in the vicinity of a blockaded port, it is possible that a nice question might arise as to how far a private vessel entering the theater of war was not bound to anticipate that the rules of the road might not be observed, so that vessels and cruisers would be navigating without fog signals and possibly without lights. If such a collision were to occur it would be very difficult for the courts of one country satisfactorily to deal with the question, and it would be very easy, and without reflecting on the national honor, for the country of the vessel which inflicted the injury to submit that question and the related questions to this maritime naval tribunal organized at The Hague.

Therefore, this Hague maritime court is one of the great steps in the advance of maritime law. It is remarkable that the law of prize and capture, as practiced in the courts of our country, has undergone scarcely any change in its procedure and method. In our last war we followed exactly the same procedure as was declared and detailed a century and a half ago by the British Government in answer to the complaint of the Prussian Government with regard to the seizure of Prussian vessels.

It is possible that if this court is organized, fewer appeals may come before it, because by the organization of the court and the differentiation of principles preceding its establishment the courts of each country will so administer the law that there will be no occasion to go further. But as a practitioner I must add that there would be a certain satisfaction in feeling that after the court of the belligerent country, no doubt exercising its best judgment, had condemned neutral vessels or property, there should be a higher tribunal to appeal to which would settle the law for the whole world.

Mr. Clifford S. Walton, of Washington, D. C. I simply wish to make a few remarks in respect to the jurisdiction of the contemplated international prize court. One of the most important things to take into consideration in this connection, I believe, is the jurisdiction of prize courts as they exist to-day in foreign countries. I have no doubt that the gentlemen who framed the rules at The Hague for the establishment of an international prize court gave due consideration to this subject-matter.

Prize courts as they exist to-day in many countries, like Spain, Italy, and other Latin countries, are largely administrative, as many gentlemen here know. In England and the United States their constitution is judicial, while in other countries they partake of both of these qualities — judicial and administrative — and in the consideration of appeals from those various jurisdictions it might be worth while to stop a moment and consider the constitution of the prize court in countries like Spain, for example. The prize court in Spain, which is administrative, is called Council of State (Consejo de Estado). It is a body of great dignity, made up of a Cabinet officer, a bishop of the church, an ambassador, a high-ranking officer of the army or navy — who has a title equivalent to that of admiral — and many others who have held high offices. A court of such high standing and influence is not going to surrender its jurisdiction easily. Naturally, such courts are jealous of their power, and if too much is asked of these courts to start out with it seems to me that we are going to have a great deal of trouble in this matter of creating an international prize court. Upon the other hand, if the contemplated

international prize court does not assume too much jurisdiction in the beginning, takes up some limited matters, the jurisdiction of which these various courts might concede, and starts in on that basis, then gradually increases its jurisdiction, it seems to me that a great deal can be accomplished in this line.

The prize laws of many of the foreign nations, as is known, are embraced in their commercial codes under the maritime parts thereof, and doubtless useful results will be reached by those interested in making a comparative study of these various commercial codes of foreign countries with reference to the prize laws.

I simply offer this as a suggestion in connection with my other remarks.

The CHAIRMAN (Mr. Wilson). A letter has been received from J. Parker Kirlin, of New York, who was to have participated in the discussion to-day, which I will ask the Secretary to read.

The Secretary read as follows:

I regret very much that an important matter has arisen to-day which makes it impossible for me to attend the meeting of the Society of International Law to-morrow, as I fully intended to do.

I am very much disappointed that I can not come, but, as you know, a lawyer has sometimes to yield his own pleasures to the demands of his clients, and this is an occasion of that sort.

I have looked into the constitution of the International Prize Court under the convention made at The Hague, and consider it to be a distinct step forward in the cause of international arbitration. By permitting a disinterested court to pass ultimately on questions of capture as they relate to the property of neutrals, especially where the captures are made on the ground of an alleged breach of blockade or the carriage of contraband in neutral bottoms, will remove a fruitful source of irritation between neutrals and belligerents, and, whatever the decision of the court may be, will tend to reconcile the owners of the captured property to the ultimate decision. The court will also serve a useful purpose by developing gradually a certain body of international prize law, which will not only guide the deliberations of the court itself under the principles of *stare decisis,* but will also afford rules which, it may be hoped, the courts of the belligerents will administer.

I should like very much to hear the discussions which will take place with regard to the establishment of this court.

Mr. Ellery Cory Stowell, of Washington, D. C. Mr. Chairman: I wish only to make a few remarks of a desultory character, because the subject has been carefully covered by other papers. I do not wish to enter into the details of the matter, but I think three or four mistaken ideas about the prize court have become current which some people might like to have corrected. One relates to how the prize-court convention has to be ratified. There are fifteen judges and it only requires the ratification of states aggregating nine. Now, as I understand, it only requires the ratification of nine judges, and you can combine some of the smaller countries having together one judge — for example, three small countries will be represented each for a period of one-third of a term and occupy one judgeship together. When ratified by a sufficient number of nations to reach a total of nine judges the convention will go into effect.

Another mistaken notion, I think, is as to the law that the court is to administer. You will see it stated in a great many instances that the conference expected to elaborate the code which the court would apply. I think that Mr. Justice Brown has covered that case very fully. There was at no period of the conference the belief that such a code would be elaborated, and there is a sentence contained in the report of Mr. Renault which shows very clearly that at the time the conference met and drew upon the plan for this court it was recognized to be impossible to elaborate such a code. It is also interesting to consider the fact that not many men who were present at The Hague had, upon arrival, any thought that a code or even a plan of a prize court could be adopted, but after arguing together, and, as Mr. Renault says in his report, feeling the influence of the spirit of the conference upon the delegates, Germany, England, France, and the United States gave their full support, and this measure was elaborated.

In the discussions, which were very delicate on all matters connected with this court, we find a divergence relating to the provision for the choosing of three of the judges to act as a delegation of the fifteen judges. Those three judges were to sit at The Hague. Now, there was a very keen contest in the committee with respect to the power which should be delegated to this delegation of three judges,

and I think the delegate of Holland was anxious to have those three men there permanently, and have the fullest power as to the calling together of the large body of fifteen judges. That, you see, would leave the court very much under the influence of three judges, one of whom would naturally have been a Dutchman; for it would have been nothing but international politeness to have chosen a Dutchman when sitting at The Hague. Those three judges would have had great control over the affairs of the court. The giving of too much control to that small number was avoided by deciding that the assembling of the whole number of judges could be brought about even against the will of the delegation of three.

Then, there was another point of a very minor character, but it is interesting to consider, and that is the payment of the judges. You will notice in reading that convention that the judges are to be paid by the Bureau at The Hague, and in Dutch money. This choice of Dutch coin to pay the judges may be the beginning of an international currency.

I have only one other remark to make, and that is that if this court is organized with nine judges, according to the method adopted, it will be ready to enter upon the discharge of the functions for which it was created.

Now, when it exists in this form the countries throughout the world might find it very much cheaper to submit their international arbitrations to this court already in action, and if this were done once or twice and there was no objection raised in any quarter, this court could gradually evolve into the international court of arbitration.

At The Hague the question of juridical equality of states — whatever that may mean — was raised; I admit that I never could see what the foundation of this discussion was. To show you that there never was any equality of the countries at The Hague you only have to take the seating of the different delegations. The first day they met they were all seated one way, and then some great power was not satisfied and they had to change the whole system. They would string the seats together in a spiral, and try to arrange them so as to give the largest powers the places they wished. Here we have an illustration of the inequality of states. Then at the opening of the

conference they had a sort of steering committee, which nominated the delegates to preside over the commissions. The smaller powers were not represented upon this steering committee. This is another instance of inequality — that inequality or rather the refusal to recognize it which caused such trouble. The very convention establishing the prize court violates this pretended equality.

At The Hague there was much talk about unanimity. The facts were that the important conventions required the adhesion of the eight great powers, for any one or two of them could block the adoption of any measure by threatening to withdraw from the conference. Had two or three smaller powers opposed a convention it would have gone through just the same.

In closing, it is pleasant to consider the action of the Norwegian delegation. The period for which the judge of each country sits in the prize court is supposed to be in proportion to the mercantile interests of his country. But Norway was not given a period commensurate with the great importance of her merchant marine. Nevertheless, in consideration of the great benefit to humanity and international interests which would result from the establishment of the court, Mr. Hagerup, first delegate of Norway, declared that his Government accorded its hearty support to the measure.

I hope that I have not taken up the time of the Society without interest.

Mr. Francis W. Aymar, of New York City. Mr. Chairman: I simply rise to ask whether we may not have a few words from our Secretary, who has really done more work in the creation of the plan by which this court is to be brought about than almost any other man. I think the members of this Society would be very glad to hear from Dr. Scott on this question.

The Chairman (Mr. Wilson). I would suggest that I have anticipated that request and have previously asked Dr. Scott to speak, but he declined. I am very glad, however, to convey the invitation from the Society to Dr. Scott.

Mr. James Brown Scott, of Washington, D. C. Mr. Chairman, and Gentlemen: I think I have shown in the last few days that I

had neither the desire nor the intention to address this meeting, and if I yield at this last moment to make a few remarks it is merely because I feel that it would be discourteous not to respond to the invitation which has been so cheerfully and generously extended.

There is indeed very little of a general nature which I could say upon the subject of the prize court which has not already been said in the admirable paper which has been delivered by Mr. Justice Brown in the early part of the afternoon. All that I would be able to add would be a few details which would pass in one ear and quickly out of the other, and I fear you would be left with no clearer definition than before.

It is a fact, however, that the fundamental idea of the prize court can not be, or should not be, overlooked, and can not be too often stated. It is familiar doctrine, everywhere recognized, that an interested person is not a proper judge in his own cause; for no matter how honest he may be, and no matter how sincere his desire may be to do justice, the scales of justice will undoubtedly tip on his side.

You may call a prize court an international court, and such is the fiction. The fact, however, is that it is a municipal court, the judges of which are appointed according to the provisions of the municipal law, and while the law administered in this court may be more universal than other law it is still a municipal code and the judges administering it are naturally bound not merely by the rules of the municipal code, but by the prejudices of the country which for the time being they represent. We have passed through many phases in order to safeguard mutual rights. In the first place, where war is normal, you have the belligerents using the neutrals as instrumentalities, and the neutrals permitting such use either from the fact that they believe in the right of the belligerent to prosecute war as he deemed best, or that they were too weak to resist the strong combination. In the next place you find a compromise between the belligerents and the neutrals, by the terms of which there may be an obligation on the one hand and a right on the other. You have the doctrine of neutrality a little more clearly defined; that it consists not merely in permitting each belligerent to make a mutual use of the territory or instrumentality, but that it consists in refusing to

allow the belligerent to make any use whatever of the neutrals or of the neutral instrumentality. But the doctrine of neutrality grows; the rights of the neutral have grown. It is clearly recognized that the world's business, the world's work, should not be put at an end, or at a standstill, merely because two nations in an excited frame of mind, bereft of reason, have resorted to the strong arm to satisfy a difficulty which, perhaps, when examined is imaginary. The neutrals at last have passed out of the class in which they formerly were of having duties imposed upon them, and they have developed their claims into the claim of neutral right, and the next stage is simply this, that having in the past asserted their rights and maintained them, at the present time they have in a recent convention, passed at a recent conference, taken into their own hands the administration of justice where neutral rights and interests are concerned; for the establishment of an international prize court is nothing more or less than the consecration of the doctrine of enlightened neutrality by neutral right. Supposing the convention meet with general approval and even now or at some future time be ratified, the captor may, as in times past, administer laws itself in the municipal court. An appeal may be taken directly from the court of first instance, or, if the municipal law so provides, there shall be one appeal to the national court, and then the case shall be transferred to the court of prize. In such case, after the court of appeals within the neutral country has passed upon the case, the docket is to be transferred to the International Court of Prize, but generally it is transferred under the most advantageous circumstances for the neutral. It is transferred from a hostile court, acting under an always present and all-pervading sense of patriotism, which in many cases means partiality, and which of course degenerates often into injustice, as Mr. Justice Brown has indicated. Two decisions by one and the same court, on a question not to be reconciled unless it be on the principle that the captor should in each case guard that which he had seized; it then follows that the case transferred from the national court, after having been tested, I might say, by the captor, is submitted either upon the facts or the law to the examination of a court the overwhelming majority of which is composed of neutrals. The interests of neutrals

are involved in the capture, and the interests of neutrals are involved in the adjudication. The belligerents are present of right; if, according to the method of rotation adopted, one of the neutrals is not during that year represented upon the court of prize, the judge or a judge of this neutral nation is admitted *ad hoc*. So that the decision reached by this neutral court, composed of an overwhelming neutral majority, can only be reached in the presence of the captor and neutral, and the principle of law struck out upon the anvil.

I know there are great difficulties in this proposition. No great reform is ever accomplished without great difficulties. I know it is a great and moot question whether our country should permit a large branch of its municipal law to be transferred from its national courts, which have in times past administered, we must think, satisfactory justice, to an international court established at The Hague. It may seem to a certain extent a renunciation of sovereignty. It would be perhaps difficult if not impossible to bring about, if it were a renunciation merely by the United States; but if you consider that juridical equality is the basis of our international law, and if you consider that no nation would be unequal because all would renounce, and if the nation is asked to allow the appeal it necessarily follows that all the other countries of Europe and all the world will permit the appeal, so that there is a general renunciation by an extreme right in the interest not of one, not of the many, but in the interest of the world as at present constituted.

Therefore, it seems to me that from whatever point it be viewed the institution of a court of prize marks an advance — a great advance — along the lines of enlightened progress. It is in the interest of the captor as well as in the interest of the neutral that the judgment reached shall be satisfactory, not merely to the captor but to the neutrals, composing the large majority of the world at the present time. It is in the interest of all concerned that the law shall be rendered certain, not that any one principle shall triumph, whether it be the principle of Anglo-American jurisprudence or whether it be the continental practice; for if we know in advance the law, we may accommodate ourselves to it, and, if we do not know the law, by a carefully considered adjudication of an international court we may

learn, and little by little the inequalities will give way; little by little the harshness will fail to appear, and we will have a body of judicial decision which will of necessity reach the symmetry of a code.

I would not close these brief informal remarks without referring to a matter which seems to me of very considerable, indeed fundamental, importance. We have in times past been proclaiming arbitration; we have, however, failed to provide a tribunal. We would wish to make arbitration a permanent policy, and a policy of arbitration naturally has in view the establishment of a permanent court. The prize court was established, or was sought to be established, as a permanent court, not as a court of arbitration, but as a court in the strictly judicial sense of the word — a court composed of judges trained in maritime law, who either from experience at the bar, upon the bench, or in the higher schools of learning had acquired legal habits of thought. A temporary tribunal meets; it adopts its rules and regulations; it reaches its judgment, pronounces it, and dissolves. Another temporary court is called into being, and those who compose it may be different judges; there is no continuity; there is no pride; there is no tradition, and nothing to sustain it; whereas, if you have established a court composed of jurists, permanently in session and responsible for its decisions and acting under a sense of judicial responsibility, you build up within the course of years an *esprit de corps*. You establish the court and with the years judicial traditions spring into being, and it must naturally follow that a court acting under the sanction of judicial responsibility, knowing that its decisions will be followed in the future just as the court has followed the decisions of the past, will take the greatest care that those decisions so rendered may be worthy of the case, worthy of the tradition, worthy of being looked upon as precedents.

Therefore, if you establish a court which court shall be composed of neutrals, strangers to the controversy, and if these judges be composed of persons versed in maritime law; if this court be permanent and act under a sense of judicial responsibility, as it must when composed of such a personnel, you have an institution which is capable not merely of sustaining the continuity of arbitral decisions,

but indeed of introducing into our modern world a carefully devised system of laws; confidence will spring up, and with confidence there will be a resort to the court, so that the friction, the irritation resulting from improper capture, from ill-considered decisions upon diplomatic controversies which have lasted for years, will be put an end to, and the difficulties arising out of maritime law which have dragged their long and weary existence through diplomatic channels, will be quickly, rapidly, and satisfactorily settled by an international court which commands the respect of the world, because it is composed of the world's best and most capable judges.

There is one objection that I have heard to the establishment of this court, and merely one, and that is that its very existence presupposes a state of war. Is it then a peace court? Is it a court in the interest of peace? Yes; I believe it is, because peace is furthered not merely by putting an end to war which has already broken out, but is advanced by removing the cause of irritation, which if unsettled may in the future lead to ill-feeling, which ill-feeling in turn may render more easy the outbreak of war. Nations rush easily to arms when a state of irritation exists. Remove the cause of a future war and the war can not well exist.

Therefore, this court is not merely a court for the settlement of disputes arising out of warfare, but it is in the larger sense of the term a peace court because it is susceptible of removing causes which might insensibly cause nations to drift into war, and thus advance the cause of peace.

I think, gentlemen, that I can add nothing to what has already been said, unless, as I have already indicated at the very beginning of my remarks, I should go into details, which I do not believe would be justified at this time and in this place. I should say, however, in concluding, that the great institution which was sought to be created was the result of a happy compromise. There was on the one hand a project introduced by the German delegation and one introduced by the British delegation. The project introduced by the German delegation was a court to consist of five judges to be appointed at the outbreak of a war, making it therefore a purely war court. Three of those judges were to be chosen from the permanent

panel of The Hague, two to be chosen — one by each belligerent, preferably from among its naval experts or admirals. The British proposition, on the other hand, looked to the establishment of a permanent institution which would sit in times of peace as well as in times of war, and which could be opened to the first unfortunate suitor. The judges of the court were no longer to be selected from the permanent panel, but were to be chosen from representatives of the maritime powers having 800,000 tonnage and more. The Germans were very desirous of seeing their project approved, and the British delegation was equally sure, as is the wont with the Briton, that their project was the better one, as is generally the case. The two views were irreconcilable until Mr. Choate, who did not care to express any views of his own, interfered as a peacemaker and reconciled the divergent views, with the result that the convention produced as the result of conciliation a compromise which was eventually adopted by this conference of forty-four states with but one dissenting voice.

I do not know whether this institution will be established or not; I do not know whether it will give way to another and a better; I do not know that the maritime conference which is to be called in London to meet in the month of October, in order to settle as far as possible the maritime rules applicable and to be administered in the court so that the conflict between the continental system on the one hand and the Anglo-American be removed, will accomplish results, but I do know, without claiming the infallibility of a prophet, that whether this court be established now or whether it be rejected, whether it be modified or whether the subject be permitted to drop for the present, the future is secure. You recognize a great principle, and when you once recognize this principle it remains. You extend suffrage to a class that before the act have not had suffrage, and whether that suffrage be wisely used or not you can not withdraw it. When you have once taken the great step, when you have once established the principle that there should be an international court composed of judges representing the neutral and the belligerent interests, that this court should be permanently in session, you have created an institution — whether that institution be put in operation immediately or whether it will have to wait for years.

Therefore, whether our beloved country accept this prize court or spurn it, whether Great Britain will have none of it, whether Germany withdraws and France wavers, the civilized world has in principle established an international court of prize.

The CHAIRMAN (Mr. Wilson). I am sure that we are all very glad that Dr. Scott was prevailed upon to address us on this subject, with which he is so familiar. I desire to announce that the Executive Council will meet immediately after the adjournment in the library at the entrance of the hotel. I presume the Secretary still has room upon that list for those who desire to further the publication fund in the way of subscription. When we adjourn this afternoon we will adjourn to meet in this room at 7 o'clock this evening, when the exercises will be of a little less strenuous character in some respects. The tickets for the occasion may be procured in the room at the entrance of the hotel. Mr. Root will be the toastmaster. There are some further notices on the program that Dr. Scott may desire to reveal.

Mr. SCOTT. Mr. Root will be the toastmaster, and General Horace Porter will feed you from his store of anecdotes. The Hon. Oscar Straus has, with much difficulty and great diffidence, been prevailed upon to speak, and Bishop O'Connell, Rector of the Catholic University of America, will speak for a few moments. You will also be delighted to learn that, last but not least, our distinguished guest from Canada, Mr. R. C. Smith, who so thrilled us with his address last night, will deliver another masterpiece this evening.

[Thereupon, at 4.15 o'clock p. m., the Society adjourned.]

At 7 o'clock in the evening of Saturday, April 25, 1908, the members of the American Society of International Law gathered at the New Willard Hotel to attend the annual banquet. The speakers on this occasion were:

Gen. Horace Porter
Hon. Oscar S. Straus
Rev. Bishop D. J. O'Connell
R. C. Smith, K. C.
Hon. David J. Brewer.

LIST OF MEMBERS [1]

HONORARY MEMBERS

Holland, Prof. Thomas E., Oxford University, Oxford, England.
Lammasch, Dr. Heinrich, University of Vienna, Vienna, Austria.
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Pardo, Felipe, Peruvian Legation, Washington, D. C.
Portela, Epifanio, Argentine Legation, Washington, D. C.
Scott, James Brown, Department of State, Washington, D. C.
Straus, Oscar S., Department of Commerce and Labor, Washington, D. C.
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[1] Members will confer a favor by notifying the Secretary of any inaccuracy of address.

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